LOAN DOCUMENT

PHOTOGRAPH THIS SHEET

TJAGSA

(1)

LEVEL

INVENTORY

DTIC ACCESSION NUMBER

Unscrambling Federal Merit Protection

DOCUMENT IDENTIFICATION

Apr 96

DISTRIBUTION STATEMENT A
Approved for Public Release
Distribution Unlimited

DISTRIBUTION STATEMENT

ACCESSION FOR

NTIS GRA&I ☑

DTIC TRAC ☐

UNANNOUNCED ☐

JUSTIFICATION

BY

DISTRIBUTION/

AVAILABILITY CODES

DISTRIBUTION	AVAILABILITY AND/OR SPECIAL	
A-1		

DISTRIBUTION STAMP

DATE ACCESSIONED

DATE RETURNED

20060105 027

DATE RECEIVED IN DTIC

REGISTERED OR CERTIFIED NUMBER

PHOTOGRAPH THIS SHEET AND RETURN TO DTIC-FDAC

DTIC FORM 70A JUN 90

DOCUMENT PROCESSING SHEET

PREVIOUS EDITIONS MAY BE USED UNTIL STOCK IS EXHAUSTED.

LOAN DOCUMENT

HANDLE WITH CARE

UNSCRAMBLING FEDERAL MERIT PROTECTION

A Thesis Presented to the

Judge Advocate General's School, United States Army

by Major John P. Stimson
United States Marines

April 1996

The opinions and conclusions I express herein are mine and do not necessarily represent the views of the Judge Advocate General's School, the United States Army, the United States Marine Corps, or any other Federal agency.

UNSCRAMBLING FEDERAL MERIT PROTECTION

Major John P. Stimson
United States Marines

ABSTRACT: President Carter and the 95th Congress crafted the Civil Service Reform Act of 1978 to overcome the flaws of the Civil Service Commission by injecting fairness, impartiality, and simplicity into Federal-sector employment litigation. Eighteen years later the system suffer from many of the same maladies that inspired the 1978 reforms. This thesis proposes a litigation system that will achieve the reform goals that so far have eluded the current process.

Table of Contents

Introduction 1

I. A Jurisdictional Smorgasboard 9

A. *What is a Federal employee?* 9

B. *The Merit Systems Protection Board* 15

1. *Appellate jurisdiction* 15

2. *Original jurisdiction* 33

C. *The Office of Special Counsel* 36

D. *The Equal Employment Opportunity Commission* 43

1. *The administrative process* 46

2. *Remedies* 51

3. *Judicial review* 53

4. *Class complaints* 54

E. *Mixed Cases* 57

1. *Mixed complaints* 58

2. *Mixed appeals* 59

3. *Administrative review* 59

4. *Judicial review* 60

F. The Negotiated Grievance Procedure 63

1. *The negotiated grievance procedure as the exclusive remedy* 64

2. *Discrimination grievances* 67

3. *Chapters 43 and 75 grievances* 68

4. *Mixed grievances* 70

5. *Other prohibited personnel practices* 71

II. The Roots, Successes and Flaws of the 1978 Civil Service Reforms 72

A. The Civil Service Commission 72

B. The Personnel Management Project 74

1. *Equal employment opportunity* 75

2. *Organizing for merit protection* 76

3. *The Personnel Management Project leadership* . . 78

C. Implementing Personnel Management Project Recommendations 80

1. *Reorganization Plan Number 1* 81

2. *The Civil Service Reform Act and Reorganization Plan Number 2* 84

D. Good Intentions; Unmet Expectations 86

1. *Discrimination cases* 88

a. *Complaints processing* 88

b. *Delay* 88

c. *Overlapping jurisdiction* 90

2. *Civil service cases* 91

3. *Arbitrator power* 94

III. Unscrambling Federal Merit Protection 97

A. Expanding MSPB Jurisdiction 98

1. *Management bias?* 99

2. *Delay on the horizon?* 102

3. *Inferior employment rights and remedies?* . . 104

4. *Employees from other merit systems* 108

B. *Abandoning the CSC Model; Integrating Review* . . . 109

1. *Individual discrimination complaints* 110

a. *Counseling and conciliation* 111

b. *The complaint* 114

c. *The agency investigation* 116

d. *Discovery* 118

e. *Summary judgment* 120

f. *The hearing* 121

g. *The initial decision* 122

h. *Remedies* 123

i. *Administrative review* 124

j. *EEOC petition for reconsideration* . . . 125

k. *Judicial review* 126

2. *Class discrimination complaints* 127

a. *Acceptance or dismissal of the complaint* 128

b. *Notice to the class* 128

c. *Discovery* 129

d. *Settlement* 129

e. *The hearing and the initial decision* . . 130

f. *Remedies* 130

g. *Administrative review* 131

h. *Notice of the decision; individual relief* 131

i. Judicial review 133

3. *Mixed cases* 134

a. Counseling 134

b. Filing the appeal 135

c. The hearing 135

d. The initial decision 136

e. Administrative review 136

f. EEOC petition for reconsideration . . . 137

g. Judicial review 137

4. *Grievance arbitration* 139

a. Discrimination grievances 140

(1) Administrative review 141

(2) EEOC petition for reconsideration . 144

(3) Judicial review 145

b. Chapters 43 and 75 grievances 145

(1) Administrative review 146

(2) Judicial review 146

c. Mixed grievances 147

(1) Administrative review 147

(2) EEOC petition for reconsideration . 148

(3) Judicial review 149

d. Prohibited personnel practices other than discrimination 150

(1) Administrative review 150

(2) Judicial review 151

e. Other personnel actions 152

(1) Administrative review 152

(2) Judicial review 153

C. Arbitrator Powers 155

IV. Conclusion 155

Career Federal civil servants enjoy a wide range of job protections. They obtain their jobs based on merit rather than political patronage;[1] they can gain tenure, after which they may be removed or disciplined only for such cause as will promote the efficiency of the Federal service;[2] and civil rights laws protect them from job discrimination based on race, color, national origin, sex, religion, disability, or age.[3] Until 1979, Federal employees looked to the Civil Service Commission (CSC) to safeguard all these rights.

---

[1] Congress first prescribed a merit-based (as opposed to political spoils) system in 1883. Civil Service Act of 1883 (Pendleton Act), 22 Stat. 403. The President still fills certain positions, however, such as cabinet secretaries and the heads of independent agencies, through political appointment. *See infra* part I.A.

[2] The Lloyd-LaFollette Act provided for employees in the competitive service to gain tenure. Act of Aug. 24, 1912, ch. 389, § 6, 37 Stat. 539, 555 (codified as amended at 5 U.S.C. § 7513 (1994)). Certain excepted service employees gained competitive-service equivalent tenure opportunities following the Veterans Preference Act of 1944, Pub. L. 78-359. 58 Stat. 387. The Civil Service Due Process Amendments, Pub. L. 101-376, 104 Stat 461 (1990), created tenure opportunities for most other excepted service employees. Career appointees to the Senior Executive Service gain tenure after 1 year. 5 U.S.C. § 3393 (1994). For an explanation of the various services within the civil service, see *infra* part I.A.

[3] *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (amending title VII of Civil Rights Act of 1964 by adding section 717 protecting Federal employees and applicants from discrimination based on race, color, religion, sex, or national origin); Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (protecting employees age 40 and over from discrimination on the basis of age); Act of Nov. 6, 1978, 92 Stat. 2982 (amending Rehabilitation Act of 1973 to prohibit discrimination on the basis of disability).

Civil Service Reform efforts in 1978 focused on the CSC. President Carter's Reorganization Plan Number 1[4] stripped the CSC of its responsibility for Federal-sector equal employment opportunity programs, policies, and complaints, and transferred that jurisdiction to the Equal Employment Opportunity Commission (EEOC). Reorganization Plan Number 2[5] effectively eliminated the CSC,[6] and, in conjunction with the Civil Service Reform Act of 1978[7] (CSRA), distributed the remaining functions among the new Office of Personnel Management[8] (OPM) and Merit Systems

---

[4] Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978), *reprinted in* 5 U.S.C. app. at 1574 (1994), *and in* 92 Stat. 3781 (1978). The Reorganization Act of 1977, Pub. L. No. 95-717, 91 Stat. 29, authorized the President to prepare reorganization plans, submit them to both Houses of Congress for review, and implement them absent a one-house legislative veto. The Supreme Court cast doubt on the constitutionality of this process in Immigration & Naturalization Service v. Chadha, 462 U.S. 919 (1983), which held that a legislative veto violates the bicameralism and presentment clause of Article I, Section 7.
Congress subsequently ratified all prior reorganizations. Act of Oct. 19, 1984, Pub. L. No. 98-532, 98 Stat. 2705. It then amended the Reorganization Act to require a joint resolution in support of any reorganization plan. Act of Nov. 8, 1984, Pub. L. No. 98-614, 98 Stat. 3192 (codified as amended at 5 U.S.C. §§ 901-912 (1994)). For a history of presidential reorganization powers, see Louis Fisher, *The Legislative Veto: Invalidated, It Survives,* 56 LAW & CONTEMP. PROBS. 273, 277-86 (1993).

[5] Reorg. Plan No. 2 of 1978, 3 C.F.R. 323 (1978), *reprinted in* 5 U.S.C. app. at 1577 (1994), *and in* 92 Stat. 3783 (1978).

[6] The MSPB technically succeeded the CSC, but bears little resemblance in mission or organization. *Id.*

[7] Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended at scattered sections of title 5, U.S. Code).

[8] Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 201, 92 Stat. 1111, 1119-21.

Protection Board[9] (MSPB). The CSRA also established a statutory basis for union representation of Federal employees,[10] created the Federal Labor Relations Authority (FLRA) to administer and enforce the labor relations statute,[11] and authorized represented employees to pursue discrimination complaints and other employment disputes through negotiated grievance procedures.[12] The reorganization plans and the CSRA dispersed authority and responsibility that the CSC had accumulated over the previous 95 years.

What inspired such dramatic change? President Carter established the Personnel Management Project in 1977 to undertake

---

[9] *Id.* § 202, 92 Stat. 1121-31.

[10] The Lloyd-LaFollette Act first authorized Federal employees to join unions, Act of Aug. 24, 1912, 37 Stat. 539, but executive orders prescribed labor-relations policy and administration prior to 1978. Exec. Order No. 10988, 3 C.F.R. 521 (1959-1963); Exec. Order No. 11491, 3 C.F.R. 861 (1966-1970); *see generally* Michael R. McMillon, *Collective Bargaining in the Federal Sector: Has the Congressional Intent Been Fulfilled?*, 127 MIL. L. REV. 169, 176-88 (1990) (describing the pre-CSRA history of federal labor relations).

[11] Civil Service Reform Act of 1978, Pub. L. No. 95-454, §§ 701-704, 92 Stat. 1111, 1192-1216. Executive Order 11491 spread primary enforcement and administration responsibilities among the Assistant Secretary of Labor for Labor-Management Relations and the Federal Labor Relations Council, which consisted of "the Chairman of the Civil Service Commission, who shall be chairman of the Council, the Secretary of Labor, an official of the Executive Office of the President, and such other officials of the Executive branch as the President may designate from time to time." Exec. Order No. 11491, § 4, 3 C.F.R. 861 (1966-1970).

[12] Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 701, 92 Stat. 1111, 1211-1213.

a comprehensive review of Federal employment.[13] Nine task forces studied all aspects of the civil service, including personnel management organization and functions, employee disputes processes, labor relations, staffing, performance evaluation, pay and benefits, and employee development.[14] Task force recommendations became the basis for President Carter's reorganization plans and his proposed reform legislation.[15]

Task force findings articulated concerns about the state of the Federal civil service. Nixon administration efforts to stack the career civil service with political allies created doubts about the integrity of the merit system.[16] The CSC's

---

[13] Letter from Dwight A. Ink to Alan K. Campbell and Wayne Granquist (Dec. 20, 1977), *in* 1 PERSONNEL MANAGEMENT PROJECT, FINAL STAFF REPORT (Dec. 1977).

[14] 2 PERSONNEL MANAGEMENT PROJECT, APPENDICES TO THE FINAL STAFF REPORT (Dec. 1977).

[15] SHIGEKI J. SUGIYAMA, PROTECTING THE INTEGRITY OF THE MERIT SYSTEM 17-18 (1985).

[16]

> [O]ne point was very much in the minds of senior personnel people and program managers at the time of the reform. That was the fact that we had recently emerged from the Watergate period during which the integrity of the career service was heavily undermined by a systematic political assault. The magnitude of that assault exceeded anything that we had seen in many years, and the full story of this has really never been told; the story, for example, about the extent to which the White House used "must hire" lists to force people on agencies. Their principal objective was the gaining of control over the career service, with agency personnel officers being bypassed and replaced for political reasons.

U.S. GENERAL ACCOUNTING OFFICE, CIVIL SERVICE REFORM: DEVELOPMENT OF 1978 CIVIL SERVICE REFORM PROPOSALS 20 (1988) (remarks of Dwight Ink,

responsibilities as the personnel policy arm of the executive branch undermined its credibility as an impartial adjudicator of employment disputes.[17] A "bewildering array of complex protective procedures" presented a burdensome obstacle for employees with legitimate claims while providing "refuge and protection [for] the incompetent and the problem employee."[18]

Reformers sought to eliminate organizational conflicts of interest, simplify procedures, expedite cases, enhance efficiency and accountability, and "[a]llow civil servants to be able to be hired and fired more easily, but for the right reasons."[19] As we approach the 20th anniversary of these reforms it is painfully apparent that they have not met expectations or goals.

Overlapping jurisdiction is more the rule than the exception for the potential combinations of the MSPB, the EEOC, the FLRA and the negotiated grievance procedure. Forum selection determines the relief and corrective action available and the

---

Executive Director, Personnel Management Project) (transcript of a seminar held jointly by GAO and the Senate Governmental Affairs Subcommittee on Federal Services, Post Office, and Civil Service on March 31, 1988).

[17] 2 PERSONNEL MANAGEMENT PROJECT, APPENDICES TO THE FINAL STAFF REPORT app. VIII at 1 (Dec. 1977). "The Civil Service Commission has in the past been lethargic in enforcing fair employment requirements within the Federal government." Message of the President to the Congress of the United States, (February 23, 1978), accompanying Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978), *reprinted in* 5 U.S.C. app. at 1574, 1575-76 (1994), *and in* 92 Stat. 3781 (1978).

[18] Letter from Dwight A. Ink to Alan K. Campbell and Wayne Granquist (Dec. 20, 1977), *in* 1 PERSONNEL MANAGEMENT PROJECT, FINAL STAFF REPORT (Dec. 1977).

[19] S. REP. No. 969, 95th Cong., 2nd Sess. 2-4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2724-26.

scope of administrative and judicial review. Procedures are inconsistent and confusing, and delay infects administrative processes. Representatives from both labor and management express dissatisfaction with the status quo, albeit from different perspectives.[20]

Some complexity may be inevitable, but this is not rocket science! The exit from this procedural quagmire is a return to basics via the intersection of the merit system and the civil rights laws. The CSRA, after all, considered civil rights part of the merit system:

> All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.[21]

---

[20] *See, e.g., Streamlining Federal Appeals Procedures: Hearings Before the Subcomm. on Civil Service of the House Comm. on Government Reform and Oversight*, 104th Cong., 1st Sess. (Nov. 29, 1995) [hereinafter *Hearings*] (statement of G. Jerry Shaw, General Counsel, Senior Executives Association) (Federal employees have too many options, and they overuse them); *Performance and Accountability in the Federal Sector: Hearings before the Subcomm. on Civil Service of the House Comm. on Government Reform and Oversight* 104th Cong., 1st Sess. (October 26, 1995) (statement of Robert M. Tobias, National President, National Treasury Employees Union) (system problems are management's fault; one remedy is to make the negotiated grievance procedure exclusive for everything covered).

[21] Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 101, 92 Stat. 1111, 1114 (codified as amended at 5 U.S.C. § 2301(b)(2) (1994)). One of the enumerated prohibited personnel practices expressly incorporates the civil rights statutes applicable to federal employees:

> Any employee who has authority to take, direct others to take, recommend, or approve any

Discrimination-free employment is a merit principle. The MSPB is the designated guardian of merit, yet the EEOC has jurisdiction over most Federal employment discrimination complaints. Efforts to share and balance power between the EEOC and the MSPB have undermined one of the primary goals of reform, which was to create a fair, understandable, and responsive system for resolving employment disputes.[22]

Part I of this paper describes the current organization and procedures for resolving Federal employment disputes. This discussion illustrates the overlap, complexity, and delay designed into the present system. Part II traces the origins of this system and evaluates its performance in light of the

---

> personnel action, shall not, with respect to such authority --
>
> (1) discriminate for or against any employee or applicant for employment --
>
> (A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);
>
> (B) on the basis of age, as prohibited under sections 12 and 1 5 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);
>
> (C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));
>
> (D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or
>
> (E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;
>
> . . . .

Id. § 101, 92 Stat. 1115 (codified as amended at 5 U.S.C. § 2302(b)(1) (1994)).

[22] *See infra* part II.A-D.

concerns and policies that motivated reform efforts in 1978. The MSPB has been a success; it is fair, proficient, and efficient within its jurisdiction. The EEOC complaints process, on the other hand, struggles to deal with the flood of Federal-sector discrimination complaints[23] that bog down in the very procedures for which the reformers criticized the CSC. Artificial distinctions between discrimination complaints and other merit cases exacerbate the problem, with ill-advised jurisdictional boundaries creating the sort of complexity, overlap, and delay that inspired the 1978 reforms. Meanwhile, arbitrators, deciding the same types of cases as the MSPB and EEOC, operate with greater powers than administrative judges and administrative law judges, and in certain cases enjoy unwarranted insulation from administrative and judicial review.

Part III proposes and explains specific measures to reshape the system to achieve the goals of fairness, simplicity, efficiency, and consistency. I propose to unify and simplify Federal merit protection by strengthening the MSPB. My proposal

---

[23] Federal employees and applicants filed 24,592 discrimination complaints in fiscal year 1994, continuing a steady increase from 17,696 in FY-91. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 at 1. A survey by the Senior Executives Association found that Federal employees and applicants filed discrimination complaints at a rate seven times greater than employees in the private sector during the period from 1982 to 1992. *Hearings, supra* note 20, (statement of Senior Executives Association General Counsel G. Jerry Shaw). This comparison may be misleading, however, because private-sector employees often have state or local remedies. *See* 42 U.S.C. § 2000e-5(c) (1988) (prescribing the enforcement relationship between the EEOC and state and local authorities).

transfers jurisdiction over Federal-sector discrimination complaints from the EEOC to the MSPB; restructures the discrimination complaints process along the lines of MSPB appeal procedures; and adjusts the relationship between the MSPB and the negotiated grievance procedure. These measures create simple and logical paths of adjudication, administrative review, and judicial review. They eliminate the conflicts of interest and unnecessary delays designed into the current discrimination complaints process. Finally, they preserve the role of collective bargaining in the Federal work place while improving administrative review channels and providing a check on arbitrator powers.

I. A Jurisdictional Smorgasbord

A. What is a Federal employee?

"[T]he 'civil service' consists of all appointive positions in the executive, judicial, and legislative branches of the Government of the United States, except positions in the uniformed services."[24] Civil servants' substantive and procedural employment rights are creatures of statute.[25] Many of

---

[24] 5 U.S.C. § 2101 (1994). The uniformed services include the armed forces, the commissioned corps of the Public Health Service, and the commissioned corps of the National Oceanic and Atmospheric Administration. *Id.*

[25] See Keim v. United States, 177 U.S. 290 (1900) (absent specific statute to the contrary, the absolute power to remove a Federal employee is incident to the power of appointment).

those statutes distinguish among employees by type of appointment, tenure status, and (occasionally) pay system. Others prescribe special rules for designated types of jobs that are excluded from the more general statutes.[26]

The *competitive service* consists of appointments in the executive branch that do not require Senate confirmation, are not in the Senior Executive Service, and are not otherwise excluded from the competitive service by law or regulation.[27] Civil service appointments that are excluded from the competitive service and not included in the Senior Executive Service fall within the *excepted service*.[28] The *Senior Executive Service* (SES) is a small corps of high-level executives, for whom Senate

---

[26] *See, e.g.* Monser v. Department of the Army, 67 M.S.P.R. 477, 480 (1995)(Defense Department civilian intelligence employee lacked MSPB appeal rights over pay matters because appointed under 10 U.S.C. § 1590); Rivard v. Department of the Interior, 30 M.S.P.R. 311, 312-13 (1986) (Bureau of Indian Affairs school teacher lacked MSPB appeal rights upon removal, because title 25 prescribes a unique personnel system); Cummings v. General Servs. Admin., 5 M.S.P.R. 47, 48-49 (1981) (National Archives Trust Fund employee had no MPSB appeal rights because enabling statute excluded the agency from various civil service laws and regulations).

[27] 5 U.S.C. § 2102 (1994). The competitive service also includes positions outside the executive branch that are specifically designated by statute as competitive service; statutorily-designated positions that require Senate confirmation; and statutorily-designated positions in the government of the District of Columbia. *Id.*

[28] 5 U.S.C. § 2103 (1994).

confirmation is not required, who manage major organizations and programs within the executive branch.[29]

A competitive service employee must complete a one-year probation period in the same or similar positions to become a tenured career civil servant.[30] Excepted service employees never formally attain "career" status, but they acquire tenure for the purpose of certain appeal rights after one year if eligible for a veterans preference,[31] and two years otherwise.[32] Career

---

[29]

> "Senior Executive Service position" means any position in an agency which is classified above GS-15 pursuant to section 5108 or in level IV or V of the Executive Schedule, or an equivalent position, which is not required to be filled by an appointment by the President by and with the advice and consent of the Senate, and in which an employee--
>
> (A) directs the work of an organizational unit;
>
> (B) is held accountable for the success of one or more specific programs or projects;
>
> (C) monitors progress toward organizational goals and periodically evaluates and makes appropriate adjustments to such goals;
>
> (D) supervises the work of employees other than personal assistants; or
>
> (E) otherwise exercises important policy-making, policy-determining, or other executive functions; but does not include--
>
> (i) any position in the Foreign Service of the United States; or
>
> (ii) or an administrative law judge position under section 3105 of [title 5].

5 U.S.C. § 3132(a)(2) (1994).

[30] 5 U.S.C. § 3321 (1994); 5 C.F.R. § 315.801 (1995).

[31] *See* 5 U.S.C. § 2108 (1994).

[32] *See infra* part I.B.1.

appointees to the SES become permanent members after a one-year probation.[33]

The General Schedule is the pay schedule with which the general public probably is most familiar. It is "a schedule of annual rates of basic pay, consisting of 15 grades, designated 'GS-1' through 'GS-15', consecutively, with 10 rates of pay for each such grade."[34] The pay grade of a particular position depends on the level of difficulty and responsibility associated with its duties, and on the qualifications that an employee must bring to that position.[35] An employee generally moves through the ten "steps" within a pay grade based on the amount of time in the position.[36]

---

[33] 5 U.S.C. § 3393(d) (1994).

[34] 5 U.S.C. § 5332(a)(2) (1994). The General Schedule actually is an assembly of 27 pay schedules, one of general application and the others providing for higher wages in designated high-cost regions or localities. *See* 5 U.S.C. §§ 5301-5307 (1994); Federal Employee Pay Comparability Act of 1990 § 302, incorporated as § 527 of Pub. L. No. 101-509, 104 Stat. 1389 (codified as amended at 5 U.S.C. §§ 5301-5307 (1994)); Exec. Order No. 12,736, 55 Fed. Reg. 51385 (1990).

[35] 5 U.S.C. § 5102 (1994).

[36] 5 U.S.C. § 5335 (1994). An employee who has not received an equivalent pay increase during the applicable period, and has performed at "an acceptable level of competence as determined by the head of the agency," will receive a scheduled step increase. *Id.* Steps 1 through 3 require a year in grade before advancement to the next higher step; steps 4 through 6 require 2 years in grade; and steps 7 through 9 require three years in grade. *Id.*

The General Schedule covers many, but not all, positions in the competitive and excepted services.[37] The Executive Schedule has five "levels" applicable to Senate-confirmed positions in the excepted service, ranging from cabinet officers to the general counsels of certain administrative agencies.[38] Prevailing rate pay schedules cover skilled craftsmen, manual laborers, and other "blue collar" competitive service employees.[39] Specialized statutory pay systems apply to an assortment of other positions, such as certain health care professionals, civilian faculty at military service academies, the U.S. Postal Service, and employees of the Government Printing Office.[40]

---

[37] The Senior Executive Service has its own statutory pay system. *See* 5 U.S.C. §§ 5382-5385 (1994).

[38] *See* 5 U.S.C. §§ 5311-5318 (1994). Level I applies to the loftiest non-elected executive branch officials, such as the Secretary of State. 5 U.S.C. § 5312 (1994). Level II covers the next tier of appointments, such as deputy cabinet secretaries and the secretaries of the military services. 5 U.S.C. § 5313 (1994). The U.S. Solicitor General, the Under Secretaries of State, and the chairs of independent agencies such as the MSPB fall under Level III. 5 U.S.C. § 5314 (1994). Other members of the MSPB are covered by Level IV. 5 U.S.C. § 5315 (1994). The Assistant Attorney General for Administration is a Level V employee. 5 U.S.C. § 5316 (1994).

[39] A prevailing rate employee is a Federal employee "in a recognized trade or craft, or other skilled mechanical craft, or in an unskilled, semiskilled, or skilled manual labor occupation, and any other individual, including a foreman and a supervisor, in a position having trade, craft, or laboring experience and knowledge as the paramount requirement." 5 U.S.C. § 5342(a)(2) (1994). Wage schedules for these employees are based on surveys of private-sector wages for the same or similar trades within designated regions. *See* 5 U.S.C. § 5343 (1994); 5 C.F.R. Part 532 (1995).

[40] *See* 5 U.S.C. § 5102(c) (1994).

The MSPB, EEOC, FLRA, and arbitrators all adjudicate civil service employment disputes.[41] The availability of a particular forum depends on the employee's status,[42] the type of dispute involved, the existence and terms of any collective bargaining

---

[41] The OPM decides classification appeals, which are substantively different from other employment disputes. This review process differs qualitatively from employment disputes before the MSPB, EEOC, and FLRA because the issue turns on administrative accuracy relative to a particular *position*, rather than on the rights of any particular *employee*.

Classification is an administrative determination of the proper grade and job series for a particular position, regardless who holds that position. Agencies designate a class and pay grade for each position in the competitive and excepted civil service. 5 U.S.C. § 5107 (1994). They place in the same class positions that "are sufficiently similar, as to-- (A) kind or subject-matter of work; (B) level of difficulty and responsibility; and (C) the qualification requirements of the work; to warrant similar treatment in personnel and pay administration." 5 U.S.C. § 5102 (1994) (general schedule employees); *see also* 5 U.S.C. § 5346 (1994) (the OPM establishes and defines individual occupations and the boundaries of each occupation for prevailing rate positions). The pay grade (1-15) of a position within a class depends on the level of difficulty and responsibility associated with the duties, and on the qualifications that an employee must bring to that position. 5 U.S.C. § 5102 (1994) (general schedule employees); 5 U.S.C. § 5341 (1994) (prevailing rate employees).

Although classification implicates no rights personal to the employee, the incumbent in a general schedule position can request that the OPM review the accuracy of position's class and pay grade. 5 C.F.R. §§ 511.603 - 511.605 (1995). The employee appeals in writing, with supporting arguments, and the agency responds similarly. 5 C.F.R. § 511.606 (1995). The OPM determines the type and scope of fact-finding it will conduct, and can require the employee and agency to furnish relevant information. 5 C.F.R. § 511.609 (1995). Neither the employee nor the agency may appeal the final OPM decision. 5 C.F.R. § 511.612 (1995). A similar process applies to positions on a prevailing rate schedule. *See* 5 C.F.R. §§ 532.701 - 532.707 (1995).

[42] I.e. the type of appointment held, the pay system applicable, and whether the employee has acquired tenure for purposes of the particular forum.

agreement, and whether any statute otherwise excludes the employee's position from a given forum's jurisdiction.[43]

B. The Merit Systems Protection Board

The MSPB has appellate jurisdiction over a broad range of employment disputes arising from personnel actions that employing agencies already have taken. Its original jurisdiction covers a narrower range of actions that generally are taken, if at all, only after the MSPB determines their propriety.

*1. **Appellate jurisdiction*** -- The nature of the dispute determines specific appellate procedures applicable to a particular case, but certain general procedures provide a baseline. An individual with appeal rights files an appeal with the appropriate MSPB regional or field office.[44] That office assigns an administrative judge to conduct a hearing and render an initial decision on the merits.[45] The agency bears the burden of persuasion to justify its action, generally by preponderant evidence but other standards of proof apply in certain types of cases.[46] The administrative judge will award appropriate

---

[43] *See supra* note 26 and accompanying text.

[44] 5 U.S.C. §§ 7513(d), 7701(a) (1994); 5 C.F.R. § 1201.22 (1995). The regulations provide a complete list of MSPB offices at appendix II to 5 C.F.R. Part 1201 (1995).

[45] 5 U.S.C. § 7701(b)(1) (1994); 5 C.F.R. §§ 1201.24, 1201.41, 1201.51-58, 1201.111 (1995).

[46] *See infra* notes 70, 73, 83, 88 and accompanying text.

equitable relief[47] to a prevailing appellant, including back pay,[48] and will award attorney fees in the interests of justice.[49]

The appellant and the agency have 35 days to petition the three-member Board for administrative review of the initial decision.[50] The OPM may intervene or independently petition for review when the administrative judge's erroneous decision would have a substantial impact on any civil service law, rule, or regulation under OPM jurisdiction.[51] The Board reviews the administrative record *de novo*, but must "afford special deference to the [administrative judge's] findings respecting credibility where the [administrative judge] relies expressly or by necessary implication on the demeanor of the witnesses."[52]

---

[47] Equitable relief corrects the effects of the errant personnel action.

[48] 5 U.S.C. § 5596 (1994).

[49] The administrative judge must make an affirmative finding of whether the award of fees is in the interests of justice. 5 U.S.C. § 7701(g) (1994) ; *see* Allen v. U.S. Postal Service, 2 M.S.P.R. 420 (1980) (providing illustrative examples in which fees would be warranted in the interests of justice). The interests of justice standard does not apply to whistleblower Individual Rights of Action. 5 U.S.C. § 1221 (1994); *see infra* notes 71-74. Title VII entitles a prevailing appellant to fees in a mixed case resulting in findings of unlawful discrimination. 42 U.S.C. § 2000e-5(k) (Supp. V 1993); *see infra* part I.E.

[50] 5 C.F.R. § 1201.113 (1995).

[51] 5 U.S.C. § 7701(e) (1994); 5 C.F.R. § 1201.114 (1995).

[52] Jackson v. Veterans Admin., 768 F.2d 1325, 1331 (Fed. Cir. 1985).

Absent a timely petition for review, the initial decision becomes the MSPB's final decision.[53] The appellant may appeal a final decision to the U.S. Court of Appeals for the Federal Circuit.[54] The agency cannot appeal a final decision, but the OPM can where a Board error "in interpreting a civil service law, rule, or regulation affecting personnel management . . . will have a substantial impact on a civil service law, rule, regulation, or policy directive."[55] The Federal Circuit reviews the administrative record for whether the final decision was

---

[53] 5 U.S.C. § 1201.113 (1994). An initial decision that becomes final without MSPB review is not precedential. Clark v. Department of the Army, 12 M.S.P.R. 428, 429 (1982).

[54] 5 U.S.C. § 7703 (1994).

[55] 5 U.S.C. § 7703(d) (1994). The OPM must first seek MSPB reconsideration if it did not previously intervene before the board. *Id.* The Federal Circuit has discretion to dismiss an OPM appeal if the court finds no substantial impact: "The granting of the petition for judicial review shall be at the discretion of the Court of Appeals." *Id.*; *see, e.g.*, Horner v. Garza, 832 F.2d 150 (Fed. Cir. 1987) (dismissing OPM petition for review of arbitration, for want of substantial impact).

arbitrary, capricious, or an abuse of discretion.[56] The U.S. Supreme Court has final review on a writ of *certiorari*.[57]

About half of all MSPB appeals involve *Chapter 75 actions*.[58] Chapter 75 of title 5, U.S. Code, prescribes due process[59] and

---

[56] I use the phrase "arbitrary, capricious, or an abuse of discretion" throughout this paper to refer to the Federal Circuit's standard of review. The statute language provides additional, redundant benchmarks for the standard of review:

> [T]he court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be --
> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (2) obtained without procedures required by law, rule, or regulation having been followed; or
> (3) unsupported by substantial evidence.

5 U.S.C. § 7703(c) (1994). Any decision properly characterized as not in accordance with law, contrary to required procedures, or unsupported by substantial evidence would by definition be either arbitrary or capricious, or reflect an abuse of discretion.

[57] 28 U.S.C. § 1254(1) (1994).

[58] *Hearings, supra* note 20 (statement of MSPB Chairman Benjamin Erdreich). Practitioners commonly refer to these cases as Adverse Actions, or True Adverse Actions. The moniker Chapter 75 action avoids confusion with other personnel actions, such as reductions-in-force and performance-based removals or reductions. From the appellant's perspective, all of these *actions* are *adverse*.

[59] The disciplining agency generally must provide the employee with 30 days advanced written notice of a proposed Chapter 75 action. 5 U.S.C. § 7513(b)(1) (1994). The statute permits shorter notice where "there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed." *Id.* The employee has at least seven days to reply orally and in writing and to submit evidence, and may be represented by an attorney or other individual (such as a union official). 5 U.S.C. § 7513(b)(2)-(3) (1994). The agency must issue a prompt written decision stating the specific reasons for the discipline. 5 U.S.C. § 7513(b)(4) (1994).

appeal rights for certain employees[60] whom agencies remove (i.e. fire), suspend without pay for more than 14 calendar days, reduce in grade,[61] or reduce in pay,[62] because of misconduct; or furlough[63] for 30 days or less.[64] Although styled as an appeal, the administrative hearing is a trial *de novo* at which the agency generally bears the burden of persuasion.[65]

Less-severe discipline may entitle a competitive service employee to some degree of due process, but that process does not include an appeal to the MSPB. *See* 5 U.S.C. §§ 7501-7504 (1994) (notice, reply, and representation rights for suspensions of 14 days or less).

[60] Competitive service and preference-eligible excepted service employees gain appeal rights after a year of continuous service in the same or similar positions. 5 U.S.C. § 7511(a) (1994); *see* 5 U.S.C. § 2108 (1994) (veterans preference). Other excepted service employees acquire appeal rights after two years. *Id.* Some employees, such as political appointees in the excepted service, employees of the Central Intelligence Agency, and members of the Foreign Service, never gain appeal rights. *See* 5 U.S.C. § 7511(b) (1994).

A career appointee in the Senior Executive Service who has completed a 1-year probationary period can appeal a removal or suspension longer than 14 days if the agency based the action on misconduct, neglect, or malfeasance. 5 U.S.C. §§ 7541-7543 (1994).

[61] I.e. the pay grade on the applicable pay schedule. *See supra* notes 34-36 and accompanying text.

[62] This refers to a reduction of pay within the range for that pay grade on the applicable pay schedule. *See id.*

[63] "'[F]urlough' means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons." 5 U.S.C. § 7511(a)(5) (1994).

[64] 5 U.S.C. § 7512 (1994).

[65] In a discipline case, the agency must prove by preponderant evidence (1) that the employee committed the misconduct; (2) the nexus between the misconduct and the efficiency of the civil service; and (3) the appropriateness of

Chapter 43 of title 5 prescribes due process[66] and appeal rights for certain employees[67] whom agencies remove or reduce in

---

the penalty. 5 U.S.C. §§ 7701(c), 7513(a) (1994); Merritt v. Department of Justice, 6 M.S.P.R. 585 (1981). The employee may defeat the agency's case with preponderant evidence supporting an affirmative defense that the agency action involved harmful procedural error; was unlawful, or was motivated by a prohibited personnel practice. 5 U.S.C. § 7701(c)(2) (1994). "In order to show harmful error under the statute and the Board's regulations, an appellant must 'prove that any procedural errors substantially prejudiced his rights by possible affecting the agency's decision.'" Stephen v. Department of the Air Force, 47 M.S.P.R. 672, 681 (1991) (quoting Cornelius v. Nutt, 472 U.S. 648, 661 (1985)).

An administrative judge who affirms an agency's action on one or more charges reviews the penalty for abuse of discretion and will mitigate that penalty if it is "unreasonable under all the relevant circumstances." Douglas v. Veterans Admin., 5 M.S.P.R. 280, 302 (1981) (articulating twelve considerations supporting a reasonable penalty); *but see* Baker v. Department of Health and Human Servs., 912 F.2d 1448, 1456 (Fed. Cir. 1990) ("We will defer to the agency's choice of penalty unless it is 'grossly disproportionate to the offense charged.'" (citation omitted)).

[66] An employee whose performance falls short of minimum standards is entitled to notice of the specific deficiencies, a reasonable opportunity to improve, and assistance toward that end. 5 C.F.R. § 432.104 (1995). The agency may remove or demote an employee who does not then improve to meet minimum standards, but only after a written 30-day notice, a reasonable opportunity for to respond orally and in writing, and a written agency decision detailing the reasons for the action. 5 U.S.C. § 4303 (1994).

Each agency must use a performance appraisal system that establishes "performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria . . . related to the job in question for each employee or position under the system." 5 U.S.C. § 4302 (1994). If an employee fails to meet the minimum performance standard for a "critical element" of the job, then that employee's overall performance is unacceptable. *See* 5 C.F.R. §§ 430.204, 432.103, 432.104 (1995).

[67] The probationary periods for Chapter 43 actions are the same as for Chapter 75 actions. 5 U.S.C. § 4303 (1994); *see supra* note 60. As with Chapter 75, Foreign Service and other specified employees are excluded from the coverage of Chapter 43.

grade because of unacceptable performance.[68] *Chapter 43 actions* accounted for about two percent of employee appeals to the MSPB in 1995.[69] The appeal is a trial *de novo* at which the agency bears a lower burden of persuasion than that for Chapter 75 actions, in recognition of the inherently subjective nature of performance evaluation.[70]

An individual who alleges retaliation for protected "whistleblowing"[71] may appeal to the MSPB via an Individual Right

---

5 U.S.C. § 4301(2) (1994). Career Senior Executive Service employees have rights that fall under the MSPB's original jurisdiction. *See infra* text accompanying notes 113-115.

[68] 5 U.S.C. § 4303 (1994).

[69] *Hearings, supra* note 20 (statement of MSPB Chairman Benjamin Erdreich).

[70] The agency must present *substantial* evidence that the employee's performance is unacceptable. 5 U.S.C. § 7701(c)(1)(A) (1994). Congress considered this lower standard appropriate for performance-based actions, because performance assessment entails matters within an agency's expertise, and performance issues are less "susceptible to the normal kind of evidentiary proof." S. REP. No. 969, 95th Cong., 2nd Sess. 54 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2776; See also Lisiecki v. Merit Sys. Protection Bd., 769 F.2d 1558, 1563-64 (Fed. Cir. 1985) (discussing the legislative history of Chapter 43).

The employee can raise the same affirmative defenses available in Chapter 75 actions. Unlike in Chapter 75 cases, however, the administrative judge and the Board have no power to review or mitigate the specific action taken in cases where the agency proves unacceptable performance. *Lisiecki,* 769 F.2d at 1565.

[71] Such retaliation is a prohibited personnel practice; the prohibition protects employees in, and applicants for, positions in the competitive service, excepted service, and career Senior Executive Service. 5 U.S.C. § 2302(a)(2)(B) (1994). The prohibition does not cover employees in, or applicants for, excepted service positions that are confidential, policy-determining, policy-making, or policy-advocating in character. *Id.*

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority --

. . .

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant because of --

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences --

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences --

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

5 U.S.C. § 2302(b)(8) (1994).

[P]ersonnel action means --

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer, or reassignment;

(v) a reinstatement

(vi) a restoration;

(vii) a reemployment;

(viii) a performance evaluation under chapter 43 of this title;

(ix) a decision concerning pay, benefits, or

of Action (IRA) after exhausting administrative remedies with the Office of Special Counsel.[72] The agency faces a heavy burden of persuasion at the MSPB hearing on a whistleblower IRA,[73] and a

---

> awards concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;
>
> (x) a decision to order psychiatric testing or examination; and
>
> (xi) any other significant change in duties, responsibilities, or working conditions;
>
> with respect to an employee in, or applicant for, a covered position in an agency.

5 U.S.C. § 2302(a)(2) (1994).

[72] When the offending personnel action is not otherwise an appealable action, a prospective IRA appellant must seek assistance from the Office of Special Counsel (OSC). The OSC investigates allegations of prohibited personnel practices, including whistleblower reprisal, "to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken." 5 U.S.C. § 1213(a)(1)(A) (1994). The whistleblower can file an IRA when either of the following conditions is satisfied: (1) the OSC has not notified the whistleblower, within 120 days, of an intent to seek corrective action; or (2) no more than 60 days have elapsed since the OSC notified the whistleblower that it terminated the investigation. 5 U.S.C. §§ 1214(a)(3), 1221(a) (1994)

Alternatively, a protected whistleblower can raise the retaliation issue before the MSPB as an affirmative defense to a Chapter 75 action, a Chapter 43 action, or any other personnel action that is otherwise appealable to the MSPB. 5 U.S.C. § 1221(b) (1994).

[73] The whistleblower must show by preponderant evidence that the disclosure was protected and was a contributing factor to a decision about a personnel action affecting the whistleblower. 5 U.S.C. § 1221(e)(1) (1994). Congress recently made it easier for IRA appellants to meet this burden:

> The employee may demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that --

prevailing appellant may recover "reasonable and foreseeable consequential damages"[74] in addition to equitable remedies and

---

> (A) the official taking the personnel action knew of the disclosure; and
>
> (B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action.

Id.; *see* United States Office of Special Counsel, Merit Systems Protection Board: Authorization Act, Pub. L. No. 163-424, § 4, 108 Stat. 4361, 4363 (1994). If the whistleblower meets that burden, the administrative judge must order corrective action unless "the agency demonstrates by *clear and convincing evidence* that it would have taken the same personnel action in the absence of such disclosure." 5 U.S.C. § 1221(e)(2) (1994) (emphasis added). "Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. It is a higher standard than 'preponderance of the evidence' as defined in 5 CFR 1201.56(c)(2)." 5 C.F.R. § 1209.4(d) (1995).

[74] 5 U.S.C. § 1221(g) (1994). The MSPB and the courts have yet to determine the scope of "consequential damages," because these only recently became available. *See* United States Office of Special Counsel, Merit Systems Protection Board: Authorization Act, Pub. L. No. 163-424, § 8, 108 Stat. 4361, 4365 (1994). The scope is potentially quite broad. Consider, for example, Black's Law Dictionary's definition of consequential damages:

> Such damage, loss, or injury as does not flow directly and immediately from the act of the party, but only from some of the consequences or results of the act. Damages which arise from intervention of special circumstances not ordinarily predictable. Those losses or injuries which are a result of an act but ar not direct and immediate.

BLACK'S LAW DICTIONARY 390 (6th ed. 1990). The context of the statutory language, the principle that waivers of sovereign immunity are narrowly construed, and the fact that MSPB appellants cannot otherwise recover taxable costs, however, weigh toward a more restrictive definition that merely covers direct out-of-pocket costs.

attorney fees. About 2 percent of MSPB appeals were IRAs in 1995.[75]

The MSPB has jurisdiction over appeals from most[76] non-probationary employees affected by a reduction-in-force (RIF)

---

[75] *Hearings, supra* note 20 (statement of MSPB Chairman Benjamin Erdreich).

[76]

> (a) Employees covered. Except as provided in paragraph (b) of this section, this part applies to each civilian employee in:
>
> (1) The executive branch of the Federal Government; and
>
> (2) Those parts of the Federal Government outside the executive branch which are subject by statute to competitive service requirements or are determined by the appropriate legislative or judicial administrative body to be covered hereunder. Coverage includes administrative law judges except as modified by Part 930 of this chapter.
>
> (b) Employees excluded. This part does not apply to an employee:
>
> (1) In a position in the Senior Executive Service; or
>
> (2) Whose appointment is required by Congress to be confirmed by, or made with the advice and consent of, the United States Senate, except a postmaster.

5 C.F.R. § 351.202 (1995).

Employees in collective bargaining units must use the negotiated grievance procedure, rather than appeal to the MSPB, unless the grievance procedure specifically excludes grievances over RIFs. 5 U.S.C. § 7121(a)(1) (1994); 5 C.F.R. § 1201.3(c) (1995); *cf.* Carter v. Gibbs, 909 F.2d 1452 (Fed. Cir.) (dismissing suit under Fair Labor Standards Act because the negotiated grievance procedure is the exclusive avenue of redress for matters within its scope, absent statutory exception), *cert. denied sub nom.* Carter v. Goldberg, 498 U.S. 811 (1990).

A career Senior Executive Service employee also may appeal a RIF action, although different standards and procedures apply. *See* 5 U.S.C. § 3595 (1994); 5 C.F.R. §1201.3(a)(4) (1995); Kirk v. Office of Personnel Management, 23 M.S.P.R. 182 (1984) (OPM statutorily required to take "all reasonable steps" to place affected SES employee with another agency).

action.[77] The agency must prove by preponderant evidence that it followed applicable laws and regulations[78] and that the RIF was for a proper reason.[79] Appeals from RIF actions accounted for about 18 percent of MSPB appeals in 1995.[80]

---

[77] The MSPB has jurisdiction over actions appealable under "any law, rule, or regulation." 5 U.S.C. § 7701(a) (1994). OPM regulations make RIF actions appealable. 5 C.F.R. § 901 (1995). An appealable RIF action is a furlough in excess of 30 days, a demotion, or a separation from the civil service, where the personnel action is necessary because (a) the agency lacks sufficient work to justify the staffing level; (b) the agency lacks funds to support its staffing level; (c) the agency's personnel ceiling requires a reduction in staffing level; the agency reorganizes; (d) another employee exercises reemployment rights or restoration rights; or (e) erosion of duties requires reclassification of an employee's position. 5 C.F.R. § 201(a) (1995).

[78] Markham v. Department of the Navy, 66 M.S.P.R. 559, 563 (1995) (must follow OPM regulations); Robinson v. U.S. Postal Serv., 63 M.S.P.R. 307 (1994) (postal reorganization cases); Kirk v. Office of Personnel Management, 23 M.S.P.R. 182 (1984) (must follow statutory requirements for career appointees in Senior Executive Service). *See also* 5 C.F.R. Part 351 (1995) (OPM-prescribed procedures for RIFs); 5 U.S.C. § 3595 (1994) (statutory requirements for RIFs of SES).

[79] Schroeder v. Department of Transportation, 60 M.S.P.R. 566, 569 (1994).

[80] *Hearings, supra* note 20 (statement of MSPB Chairman Benjamin Erdreich). RIF actions accounted for 9 percent of appeals in 1994, U.S. MERIT SYSTEMS PROTECTION BOARD, ANNUAL REPORT FOR FISCAL YEAR 1994; 5 percent in 1993, U.S. MERIT SYSTEMS PROTECTION BOARD, ANNUAL REPORT FOR FISCAL YEAR 1993; 8 percent in 1992, U.S. MERIT SYSTEMS PROTECTION BOARD, ANNUAL REPORT FOR FISCAL YEAR 1992; 8 percent in 1991, U.S. MERIT SYSTEMS PROTECTION BOARD, ANNUAL REPORT FOR FISCAL YEAR 1991; and 3 percent in 1990, U.S. MERIT SYSTEMS PROTECTION BOARD, ANNUAL REPORT FOR FISCAL YEAR 1990. The higher rate in recent years reflects the fruition of cases arising from extensive reorganization within the U.S. Postal Service. *See* U.S. GENERAL ACCOUNTING OFFICE, MERIT SYSTEMS PROTECTION BOARD - MISSION PERFORMANCE, EMPLOYEE PROTECTIONS, AND WORKING ENVIRONMENT (1995).

A General Schedule employee may appeal to the MSPB if the agency head denies a scheduled within-grade pay increase[81] because of the employee's performance.[82] As in Chapter 43 actions, the agency's burden of persuasion is lower than the

---

[81] *See supra* notes 34-36 and accompanying text.

[82]

> When a determination is made [by the head of the agency] that the work of an employee is not of an acceptable level of competence, the employee is entitled to prompt written notice of that determination and an opportunity for reconsideration of the determination within his agency under uniform procedures prescribed by the Office of Personnel Management. If the determination is affirmed on reconsideration, the employee is entitled to appeal to the Merit Systems Protection Board.

5 U.S.C. § 5335(c) (1994). "To be determined at an acceptable level of competence, the employee's most recent [performance evaluation] shall be at least Level 3 ("Fully Successful" or equivalent)." 5 C.F.R. § 531.404 (1995).

Employees in collective bargaining units must use the negotiated grievance procedure, rather than appeal to the MSPB, to resolve the matter unless the grievance procedure specifically excludes disputes over the denial of a within-grade pay increase. *See infra* part I.F.1.

general preponderance standard.[83] Denials of within-grade increases generated about 1 percent of appeals in 1995.[84]

Probationary employees have no statutory appeal rights, but OPM regulations[85] authorize them to appeal to the MSPB if terminated because of discrimination based on marital status or partisan politics,[86] or because of pre-appointment matters if the

---

[83] The administrative judge (and the Board) must sustain the agency's decision if it is supported by substantial evidence.

> [T]he imposition of a higher evidentiary burden for withholding within-grade increases than for unacceptable performance discharges would be at least unreasonable if not absurd, and application of the substantial evidence standard is clearly more consonant with the policy of the legislation as a whole which is to ease or at least not to increase the evidentiary burden required to sustain performance-based actions.

Parker v. Defense Logistics Agency, 1 M.S.P.R. 505, 525 (1980).

[84] *Hearings, supra* note 20 (statement of MSPB Chairman Benjamin Erdreich).

[85] 5 C.F.R. § 315.806 (1995). *See also* 5 U.S.C. § 7701(a) (1994): "An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation."

[86] Partisan politics means affiliation with any political party or candidate. Sweeting v. Department of Justice, 6 M.S.P.R. 715 (1981).

removal was procedurally defective.[87] The appellant, rather than the agency, bears the burden of persuasion.[88]

New managers and supervisors serve a probationary period even if they were tenured in their non-supervisory or non-managerial position.[89] An employee who does not satisfactorily complete this probation is entitled to return to a position of no lower grade and pay than that held prior to becoming a manager or supervisor.[90] An employee who would have completed probation but

---

[87] A probationary employee removed for pre-appointment reasons is entitled to advance, written notice of the specific reasons for the proposed action; a reasonable opportunity to respond in writing; agency consideration of the response; and a written decision. 5 C.F.R. § 315.805 (1995).

[88] If a terminated probationer makes a non-frivolous allegation discrimination based on marital status or political partisanship, and makes a factual showing sufficient to establish the MSPB's jurisdiction, then the agency must articulate a legitimate non-discriminatory reason for the termination. The appellant then must prove by preponderant evidence that the agency's reason is mere pretext for discrimination. Stokes v. Federal Aviation Admin., 761 F.2d 682, 686 (Fed. Cir. 1985).

A probationer who appeals a removal for pre-appointment reasons must prove that the agency's failure to follow prescribed procedures constituted harmful error. Pope v. Department of the Navy, 62 M.S.P.R. 476 (1994). The merits of the decision to terminate the probationer are not at issue on appeal. "Rather, only the issue of whether the agency's failure to follow the procedures prescribed in 5 C.F.R. § 315.805 was harmful error is presented; if there was harmful error, the agency's action must be set aside." Keller v. Department of the Navy, 1996 WL 5853 (MSPB 1996).

[89] 5 U.S.C. § 3321 (1994).

[90] 5 U.S.C. § 3321 (1994).

for discrimination based on partisan political affiliation or marital status may appeal to the MSPB.[91]

The OPM administers Federal laws regarding civil service retirement and disability benefits.[92] An individual[93] aggrieved by an OPM determination of rights or interests in such benefits may appeal that action to the MSPB.[94] The individual and OPM are the parties, and the appellant must prove entitlement to the benefits by preponderant evidence.[95] Seventeen percent of MSPB appeals in 1995 involved retirement or disability issues.[96]

---

[91] 5 C.F.R. § 351.908 (1995); see Kiser v. Department of Educ., 66 M.S.P.R. 372 (1995) (discussing the requisite showing to establish jurisdiction).

[92] 5 U.S.C. §§ 8347(a), 8461 (1994).

[93] This person may be an employee, a former employee, or some other beneficiary. *See, e.g.*, Cheeseman v. Office of Personnel Management, 791 F.2d 138, 141 (Fed. Cir. 1986) (surviving spouse), *cert. denied*, 479 U.S. 1037 (1987).

[94] 5 U.S.C. § 8347(d)(1) (1994).

[95] Cheeseman v. Office of Personnel Management, 791 F.2d 138, 141 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1037 (1987). Although entitlement is a question of law, and OPM has no discretion in awarding benefits, Oliveros v. Office of Personnel Management, 49 M.S.P.R. 360 (1991), the MSPB and reviewing courts defer to the OPM's interpretation of the civil service laws it administers "unless there are compelling indications that [OPM] is wrong." Money v. Office of Personnel Management, 811 F.2d 1474 (Fed. Cir. 1987) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984); Red Lion Broadcasting Co. v. Federal Communications Comm'n, 395 U.S. 367, 381, (1969); American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed. Cir.1986)).

[96] *Hearings, supra* note 20 (statement of MSPB Chairman Benjamin Erdreich).

Finally, the MSPB has appellate jurisdiction over an assortment of other matters that combined to account for about eight percent of initial appeals during fiscal year 1995:[97] negative suitability determinations;[98] furloughs of career SES

---

[97] *Id.*

[98] 5 C.F.R. § 731.501 (1995). A suitability determination evaluates applicants, eligibles, and probationary appointees for whether their employment would serve the efficiency of the service.

> (a) General. In determining whether its action will promote the efficiency of the service, OPM or an agency to which OPM has delegated authority under § 731.103 of this chapter, shall make its determination on the basis of:
>
> (1) Whether the conduct of the individual may reasonably be expected to interfere with, or prevent, efficient service in the position applied for or employed in; or
>
> (2) Whether the conduct of the individual may reasonably be expected to interfere with, or prevent, effective accomplishment by the employing agency of its duties or responsibilities; or
>
> (3) Whether a statutory or regulatory bar prevents the lawful employment of the individual in the position in question.
>
> (b) Specific factors. When making a determination under paragraph (a) of this section any of the following reasons may be considered a basis for finding an individual unsuitable:
>
> (1) Misconduct or negligence in prior employment which would have a bearing on efficient service in the position in question, or would interfere with or prevent effective accomplishment by the employing agency of its duties and responsibilities;
>
> (2) Criminal or dishonest conduct related to the duties to be assigned to the applicant or appointee, or to that person's service in the position or the service of other employees;
>
> (3) Intentional false statement or deception or fraud in examination or appointment;
>
> (4) Refusal to furnish testimony as required by § 5.4 of this chapter;
>
> (5) Alcohol abuse of a nature and duration

members;[99] return rights following military service or recovery from a compensable injury;[100] priority placement following a reduction-in-force or recovery from a compensable injury;[101] reinstatement following service under the Foreign Assistance Act

---

which suggests that the applicant or appointee would be prevented from performing the duties of the position in question, or would constitute a direct threat to the property or safety of others;

(6) Illegal use of narcotics, drugs, or other controlled substances, without evidence of substantial rehabilitation;

(7) Knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force;

(8) Any statutory or regulatory bar which prevents the lawful employment of the person involved in the position in question.

(c) Additional considerations. In making a determination under paragraphs (a) and (b) of this section, OPM and agencies shall consider the following additional factors to the extent that they deem these factors pertinent to the individual case:

(1) The kind of position for which the person is applying or in which the person is employed, including the degree of public trust or risk in the position;

(2) The nature and seriousness of the conduct;

(3) The circumstances surrounding the conduct;

(4) The recency of the conduct;

(5) The age of the person involved at the time of the conduct;

(6) Contributing societal conditions;

(7) The absence or presence of rehabilitation or efforts toward rehabilitation.

5 C.F.R. § 731.202 (1995).

[99] 5 C.F.R. § 359.805 (1995).

[100] 5 C.F.R. § 353.401 (1995).

[101] 5 C.F.R. §§ 301.501, 330.202 (1995).

Special Counsel prosecutions.[112] The party bringing an original jurisdiction case files directly with the Board, rather than with a regional or field office.

A non-probationary, career Senior Executive Service employee who is notified of an impending performance-based removal from the SES may request an informal MSPB hearing,[113] but must do so at least 15 days before the effective date of the removal.[114] Unlike other actions within the MSPB's jurisdiction, however, the hearing officer's determination on the merits is not subject to administrative or judicial review.[115]

The Administrative Procedure Act[116] created the position of administrative law judge (ALJ) to perform certain agency adjudications.[117] The Act granted ALJs limited insulation from

---

[112] 5 U.S.C. §§ 1214-1216 (1994); 5 C.F.R. § 1201.2(a) (1995).

[113] *See, e.g.*, Gaines v. Department of Housing and Urban Dev., 14 M.S.P.R. 473 (1983) (informal hearing referred to Board's Chief Administrative Law Judge). Career SES employees have no appeal rights under Chapter 43. 5 U.S.C. § 4301 (1994).

[114] 5 U.S.C. § 3592(a) (1994); 5 C.F.R. § 359.502(b) (1995). The agency must place the employee in a non-SES position. 5 U.S.C. § 3592(a) (1994).

[115] "[S]uch hearing shall not give the career appointee the right to initiate an action with the Board under section 7701 of this title . . . ." 5 U.S.C. § 3592(a) (1994).

[116] Pub. L. No. 79-404, 60 Stat. 237-44 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5372, and 7521 (1994)).

[117] "Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title." 5 U.S.C.

agency control by vesting responsibility for ALJ tenure and compensation decisions in the Office of Personnel management,[118] by exempting ALJs from performance ratings,[119] and by authorizing their discipline or removal only for good cause found by the MSPB after an opportunity for a hearing.[120] In contrast, administrative judges are excepted service, general schedule employees of their employing agencies, with little of the independence that ALJs enjoy.

An agency seeking the discipline of one of its ALJs files a complaint with the MSPB, which assigns the matter to the Chief ALJ unless the Board decides to hear the case directly.[121] The Chief ALJ holds a hearing using standard MSPB hearing procedures[122] and issues a recommended decision that becomes the final MSPB decision absent timely exceptions by the agency or the respondent ALJ.[123] The Board determines the penalty *de novo* if it finds good cause to impose discipline.[124] Judicial review lies

---

§ 3105 (1994).

[118] 5 U.S.C. § 5372 (1994).

[119] 5 U.S.C. § 4301 (1994).

[120] These requirements apply to removal, suspension, reduction in grade, reduction in pay, or a furlough of 30 days or less. 5 U.S.C. § 7521(a) (1994).

[121] 5 C.F.R. § 1201.134 (1995).

[122] *See supra* part I.B.1.

[123] 5 U.S.C. § 557 (1994); 5 C.F.R. § 1201.135 (1995).

[124] Department of Commerce v. Dolan, 39 M.S.P.R. 314, 317 (1988) (agency recommendations receive no deference).

initially in the Court of Appeals for the Federal Circuit,[125] and ultimately in the U.S. Supreme Court on a writ of *certiorari*.[126]

The last area of MSPB original jurisdiction involves another independent agency, the Office of Special Counsel.

C. The Office of Special Counsel

The Office of Special Counsel (OSC) originally was the investigative and prosecutorial arm of the MSPB;[127] it became an independent agency with the passage of the Whistleblower Protection Act of 1989.[128] The OSC mission is to investigate alleged prohibited personnel practices[129] and bring corrective[130]

---

[125] 5 U.S.C. § 7703(b) (1994).

[126] 28 U.S.C. § 1254(1) (1994).

[127] Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 202, 92 Stat. 1111, 1122-1131.

[128] Pub. L. No. 101-12, 103 Stat 16.

[129] In addition to unlawful employment discrimination, *see supra* note 21, and retaliation against protected whistleblowers, *see supra* note 71, the following are prohibited personnel practices:

> (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority--
>
> . . .
>
> (2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action except as provided under section 3303(f);
>
> (3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to

engage in such political activity;

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;

. . .

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of--

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) for refusing to obey an order that would require the individual to violate a law;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the

and disciplinary[131] actions before the MSPB as warranted; to interpret and enforce the Hatch Act provisions on political activity;[132] and to provide a "secure channel through which federal employees may make disclosures of information evidencing violations of law, rule or regulation, gross waste of funds,

---

District of Columbia, or of the United States; or
(11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

5 U.S.C. § 2302 (1994).

[130] *See* 5 U.S.C. § 1214 (1994). Corrective action is remedial for the affected employee, and includes relief such as back pay and restoration of benefits lost because of a prohibited personnel practice. "The Board shall order such corrective action as the Board considers appropriate . . . ." 5 U.S.C. § 1214(b)(4)(A) (1994).

[131] *See* 5 U.S.C. § 1215 (1994); *see also supra* notes 149-154 and accompanying text.

[132]
(a) An employee may not engage in political activity--
(1) while the employee is on duty;
(2) in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof;
(3) while wearing a uniform or official insignia identifying the office or position of the employee; or
(4) using any vehicle owned or leased by the Government of the United States or any agency or instrumentality thereof.

5 U.S.C. § 7324 (1994). In 1993 Congress lifted restrictions that had prohibited employees from influencing elections or participating in campaigns. Pub. L. No. 103-94, 107 Stat. 1003 (1993).

gross mismanagement, abuse of authority, or a substantial and specific danger to public health or safety, without disclosure of the employee's identity (except with the employee's consent) and without fear of retaliation."[133]

The OSC assigns top priority to allegations of whistleblower retaliation,[134] and generally defers to the EEOC in discrimination cases.[135] It must investigate allegations of prohibited personnel practices "to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken."[136] When the

---

[133] U.S. OFFICE OF SPECIAL COUNSEL, ANNUAL REPORT FROM THE OFFICE OF SPECIAL COUNSEL FOR FISCAL YEAR 1994 at 2. An employee can reveal to the OSC even matters the disclosure of which is classified or otherwise specifically prohibited by law. 5 U.S.C. § 2302(b)(8)(B) (1994). This ombudsman role is limited to investigation, reporting, and monitoring. 5 U.S.C. § 1213 (1994). The OSC can initiate related litigation as a corrective or disciplinary action. 5 U.S.C. §§ 1214-1215 (1995).

[134] *See supra* note 71.

[135] U.S. OFFICE OF SPECIAL COUNSEL, ANNUAL REPORT FROM THE OFFICE OF SPECIAL COUNSEL FOR FISCAL YEAR 1994 at 3 (whistleblower priority); 5 C.F.R. § 1810 (1995) (deferral policy). Sexual harassment cases are an exception to the deferral policy, as are those involving egregious harassment and those for which the EEO process appears to be inadequate; and the OSC retains the prerogative to monitor the EEO process in a given case. Bruce D. Fong, EEO and the U.S. Office of Special Counsel, Presentation to the Federal EEO Practitioners Forum (March 3, 1995); *see, e.g.*, Special Counsel v. Russell, 32 M.S.P.R. 115 (1987) (OSC disciplinary action against an alleged perpetrator of sexual harassment).

[136] 5 U.S.C. § 1213(a)(1)(A) (1994).

OSC finds such reasonable grounds, it reports the findings and recommendations to the MSPB, the OPM, and the agency involved.[137]

The OSC may initiate a *corrective action* by filing a complaint with the MSPB against an agency that does not correct the problem within a reasonable period.[138] The respondent agency files a written answer,[139] and the MSPB may order either party to file briefs or memoranda.[140] The Board normally will not order a hearing, but both parties and the OPM are entitled to comment orally or in writing, and alleged victim of the prohibited personnel practice may submit written comments.[141] The Board will order corrective action if the OSC shows by preponderant evidence that a prohibited personnel practice (other than reprisal for protected whistleblowing) "has occurred, exists, or is to be taken."[142]

In whistleblower reprisal cases, the OSC need only demonstrate that the protected disclosure was a contributing factor[143] to the personnel action.[144] The MSPB then will order

---

[137] 5 U.S.C. § 1214(b)(2)(A) (1994).

[138] 5 U.S.C. § 1214(b)(2)(B) (1994).

[139] 5 C.F.R. § 1201.125 (1995).

[140] 5 C.F.R. § 1201.123 (1995).

[141] 5 U.S.C. § 1214(b)(3) (1994); 5 C.F.R. §§ 1201.124, 1201.126 (1995).

[142] 5 U.S.C. § 1214(b)(4)(A) (1994).

[143] "[T]he 'contributing factor' standard is a lower standard than the 'substantial factor' standard that was in effect in whistleblower cases before the Whistleblower Protection

corrective action unless the agency demonstrates by clear and convincing evidence[145] that it would have taken the disputed personnel action even absent the protected disclosure.[146] The OSC cannot obtain judicial review of the MSPB decision in a corrective action,[147] but the victim of the alleged prohibited

---

Act became law." Gergick v. General Servs. Admin., 43 M.S.P.R. 651 (1990) (citation omitted). "Contributing factor means any disclosure that affects an agency's decision to threaten, propose, take, or not take a personnel action with respect to the individual making the disclosure." 5 C.F.R. § 1209.4(c) (1995).

Recent legislation created a presumption that the disclosure was a contributing factor where the official taking action knew of the disclosure and took the action within a period such that a reasonable person could infer the connection. United States Office of Special Counsel, Merit Systems Protection Board: Authorization Act, Pub. L. No. 163-424, § 4, 108 Stat. 4361, 4363 (1994); *see supra* note 73. This legislation, however, amended the burden only for the IRA appellant. 5 U.S.C. § 1221(e)(1) (1994). The Act contained no similar provision applicable to OSC corrective actions. Nevertheless, the OSC considers the amendment applicable to corrective actions as well. *See* U.S. OFFICE OF SPECIAL COUNSEL, ANNUAL REPORT FROM THE OFFICE OF SPECIAL COUNSEL FOR FISCAL YEAR 1994 at 21.

[144] 5 U.S.C. § 1214(b)(4)(B) (1994); 5 C.F.R. § 1201.126(b)(1) (1995).

[145] "Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. It is a higher standard than `preponderance of the evidence' as defined in 5 CFR 1201.56(c)(2)." 5 C.F.R. § 1209.4(d) (1995).

[146] 5 U.S.C. § 1214(b)(4)(B) (1994). The burdens of persuasion are such that, from a practical standpoint, the agency is pushing uphill in any case where there was, in fact, a protected disclosure and agency knowledge of that disclosure.

[147] *See* 5 U.S.C. § 7703 (1994).

personnel practice may appeal an adverse decision to the U.S. Court of Appeals for the Federal Circuit.[148]

The OSC can initiate a *disciplinary action* by filing a complaint with the MSPB against an employee[149] who the OSC finds has committed a prohibited personnel practice, engaged in prohibited political activity, wrongfully withheld information from the OSC, or wrongfully failed to comply with an order of the MSPB.[150] The respondent employee is entitled to a hearing before the Board or an ALJ, and a written Board decision.[151] Where the OSC proves the allegation by preponderant evidence,[152] the MSPB fashions a penalty from options that include removal, reduction

---

[148] 5 U.S.C. § 1214(c) (1994).

[149] The agency is not a party to a disciplinary action.

[150] 5 U.S.C. §§ 1215(a), 1216(a) (1994). See, e.g. Special Counsel v. Russell, 32 M.S.P.R. 115 (1987) (prohibited personnel practice -- sexual harassment); Special Counsel v. Rivera, 61 M.S.P.R. 440 (1994) (Hatch Act violation). A search of the WESTLAW MSPB database disclosed no reported cases of discipline for knowingly and willfully refusing or failing to comply with an order of the MSPB.

[151] 5 U.S.C. § 1215(a)(2) (1994); 5 C.F.R. § 1201.124(b) (1995).

[152] In contrast to corrective actions, the Special Counsel does not enjoy a lower standard of proof in cases alleging whistleblower retaliation. The OSC must prove by a preponderance of the evidence that the protected disclosure was a *significant* factor in the prohibited personnel action. Eidmann v. Merit Sys. Protection Bd., 976 F.3d 1400, 1405 (Fed. Cir. 1992). The OSC, therefore, might prevail in a corrective action against an agency based on the retaliatory actions of one of its officials, but fail to meet its burden in a disciplinary action against the employee because the protected disclosure was a contributing factor but not a significant factor in the personnel action.

in grade, debarment from Federal employment for 5 years, suspension, reprimand, and civil penalties up to $1000.[153] The respondent employee may appeal to the Federal Circuit.[154]

D. The Equal Employment Opportunity Commission

Unlike the MSPB, which has very limited jurisdiction, the EEOC has jurisdiction over complaints from a broad range of employees and applicants for employment. Just about every executive branch employee or applicant has access to the Federal discrimination complaints process, including employees of nonappropriated fund instrumentalities and Government corporations such as the Federal Insurance Deposit Corporation.[155] Coverage extends further to positions in the U.S. Postal Service

---

[153] 5 U.S.C. § 1215(a)(3) (1994).

[154] 5 U.S.C. § 7703 (1994).

[155]

> (a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage
>
> All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds) . . . .

42 U.S.C. § 2000e-16 (1988). "The military departments are: The Department of the Army. The Department of the Navy. The Department of the Air Force." 5 U.S.C. § 102 (1994). "For purposes of this title, 'Executive agency' means an Executive department, a Government corporation, and an independent establishment." 5 U.S.C. § 105 (1994).

and Postal Rate Commission, the Government Printing Office, the General Accounting Office, and the Library of Congress; and to competitive service positions in the judicial branch and in the Government of the District of Columbia.[156]

An individual may complain of discrimination based on Title VII of the Civil Rights Act of 1964[157] (race, color, religion, sex, national origin); the Age Discrimination in Employment Act[158] (age 40 or over); the Rehabilitation Act of 1973[159] (disability);

---

[156] 42 U.S.C. § 2000e-16(a) (1988). Congress extended the protection of Federal discrimination laws to its other employees in 1995. *See* Congressional Accountability Act of 1995, Pub. L. No. 104-1, 109 Stat. 3 (to be codified at 2 U.S.C. §§ 1301-1438). Counseling and mediation are the first two stages of the complaints process for Congressional employees. The employees then may elect an administrative process or a civil action in U.S. district court. The administrative process includes a hearing, administrative review by the Board of Directors of the Office of Compliance, and judicial review in the U.S. Court of Appeals for the Federal Circuit. *Id.* § 401.

[157] *See Id.*

[158] *See* 29 U.S.C. § 633a (1994).

[159] *See* 29 U.S.C. §§ 791-797 (1994). Section 501 of the Rehabilitation Act (29 U.S.C. § 791) requires Federal agencies to design and implement affirmative action programs for individuals with disabilities. Section 504 (29 U.S.C. § 794) directs that "no otherwise qualified individual with a disability shall, solely by reason of his or her disability be excluded from participating in, denied benefits of, or subjected to discrimination under any *program or activity* conducted by an executive agency." 29 U.S.C. § 794 (1994) (emphasis added). Some early courts relied on section 504 as a basis for prohibiting disability discrimination by Federal agencies. *See, e.g.* Prewitt v. U.S. Postal Serv., 662 F.2d 292 (5th Cir. 1981). Congress muddied the waters in 1978 by adding section 504a (29 U.S.C. § 794a), which makes Title VII rights, remedies, and procedures available with respect to a complaint under section *501,* even though section 501 mentions nothing about a cause of action. Amendments in 1989 appear to have ruled out section 504

or the Equal Pay Act (sex-based wage discrimination).[160] Congress authorized the EEOC to craft the administrative process by which to handle such complaints.[161]

---

as the basis of a Federal employee's complaint: section 504(b) now defines *program or activity* as a non-Federal entity receiving Federal funds. 29 U.S.C. § 791(b) (1994).

The Civil Rights Act of 1991 filled the hole in section 501 by referencing EEOC regulations:

> In an action brought by a complaining party under the powers, remedies, and procedures set forth in section . . . 717 of the Civil Rights Act of 1964 [42 U.S.C.A. §§ . . . 2000e-16] (as provided in . . . section 794a(a)(1) of Title 29 . . .) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of Title 29 and the regulations implementing section 791 of Title 29, or who violated the requirements of section 791 of Title 29 or the regulations implementing section 791 of Title 29 concerning the provision of a reasonable accommodation . . . may recover compensatory . . . damages . . . .

42 U.S.C. § 1981a(a)(2) (Supp. V 1993). While hardly a model of clarity, this statutory patchwork ensures that Federal employees have a cause of action under section 501 of the Rehabilitation Act.

[160] *See* 29 U.S.C. § 206(d) (1994) (as amended by the Fair Labor Standards Amendments of 1974). The Title VII prohibition of sex discrimination covers any matter that would form the basis of a complaint under the Equal Pay Act.

[161]

> Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section.

*1. **The administrative process*** -- The first stop in the EEOC administrative complaints process is the equal employment opportunity (EEO) counselor, who works for the agency that allegedly discriminated and performs the counseling function either full-time or as a collateral duty.[162] Counselors normally are not attorneys, and they have widely-varying degrees of training and expertise in employment discrimination law.

The counseling process resolves most discrimination cases before a formal complaint is ever filed. The counselor meets with the complainant to explain the complaints process and identify issues; meets with witnesses and gathers information; and attempts to resolve the employment dispute at the lowest level possible.[163] Statistics indicate a good, but declining, success rate. From 1984 through 1991, about 80 percent of employees who contacted EEO counselors chose *not* to file formal

---

42 U.S.C. § 2000e-16(b) (1988).

[162] During fiscal year 1994 more than 89 percent of EEO counselors performed this function as a collateral duty; 6.3 percent were full-time counselors; another 3.5 percent were full-time counselor/investigators; and less than 1 percent were part time employees who performed counseling duties exclusively or along with investigative duties. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 at 17.

[163] *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EQUAL EMPLOYMENT OPPORTUNITY MANAGEMENT DIRECTIVE FOR 29 C.F.R. - PART 1614, EEO MD-110, ch. 2 (1992).

complaints. That rate dropped to 77 percent in fiscal year 1992, 67 percent in FY-93, and 63 percent in FY-94.[164]

The complainant generally must contact an EEO counselor within 45 days of the discriminatory act or the effective date of a discriminatory personnel action.[165] The counselor then has 30 days to complete counseling[166] unless the complainant agrees to an extension of up to 60 days,[167] or the agency and the individual agree to pursue an alternative dispute resolution procedure.[168] The counselor provides the complainant a "notice of final

---

[164] *See Hearings, supra* note 20 (statement of EEOC Chairman Gilbert F. Casellas). This precipitous decline began during fiscal year 1991, coincident with the amendment of Title VII and the Rehabilitation Act that authorized jury trials and compensatory damages. *See* 42 U.S.C. § 1981a (Supp. V 1993). Happenstance is an unlikely explanation for the timing of these events, although the extent the relationship is debatable.

[165] 29 C.F.R. § 1614.105(a)(1) (1995). The regulations provide relief from the deadline

> when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she should not have been [sic] known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

29 C.F.R. § 1614.105(a)(2) (1995).

[166] 29 C.F.R. § 1614.105(d) (1995).

[167] 29 C.F.R. § 1614.105(e) (1995).

[168] Diversion to an alternative dispute resolution mechanism extends the counseling period to 90 days. 29 C.F.R. § 1614.105(f) (1995).

interview" at the end of the counseling period, following which the complainant may file a formal discrimination complaint within 15 days.[169]

The respondent agency determines whether to accept or dismiss the complaint. It *shall* dismiss when the complaint fails to state a claim upon which relief can be granted; the complaint states a claim already pending before the EEOC, or that has already been decided by the EEOC; the complainant fails to meet the deadlines described above (counselor contact within 45 days, formal complaint within 15 days of notice of final interview); or the claim is moot or not yet ripe.[170]

The complainant may appeal to the EEOC within 30 days of the agency's dismissal of part or all of the complaint.[171] Any statement or brief in support of the appeal is due 30 days after filing the appeal.[172] The respondent agency then has 30 days to forward the complaint file to the EEOC along with any agency statement or brief in opposition.[173] The EEOC reviews the record and any supplemental information it may request from the parties,

---

[169] 29 C.F.R. § 1614.106 (1995).

[170] 29 C.F.R. § 1614.107 (1995).

[171] 29 C.F.R. §§ 1614.401(a), 1614.402 (1995). The Office of Federal Operations receives and decides appeals on behalf of the Commission. 29 C.F.R. §§ 1614.404, 1614.405 (1995).

[172] 29 C.F.R. § 1614.403(d) (1995).

[173] 29 C.F.R. § 1614.403(d) (1995).

and determines whether the agency should have accepted the complaint.[174]

The process moves to the investigation stage if the agency accepts the complaint or loses the appeal from a dismissal. The agency investigates the complaint, developing "a complete and impartial factual record upon which to make findings on the matters raised by the written complaint."[175] The agency must complete the investigation within 180 days from the date the complainant files the formal complaint, or from the date that the EEOC orders acceptance of the complaint, unless the parties agree to an extension of up to 90 days.[176]

The agency forwards a copy of the completed investigation to the complainant, who then has 30 days to request either a hearing before an EEOC administrative judge or a final agency decision without a hearing.[177] The agency head makes the decision based on the administrative record if the complainant elects a final

---

[174] 29 C.F.R. §§ 1614.404, 1614.405 (1995).

[175] 29 C.F.R. § 1614.108 (1995).

[176] 29 C.F.R. § 1614.108(e) (1995).

[177] 29 C.F.R. § 1614.108(f) (1995). Agencies completed 14,399 investigations in fiscal year 1994, and complainants requested 10,712 hearings. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 at 45, T-24. The fiscal year 1994 cases from which complainants requested hearings are not a precise subset of the fiscal year 1994 cases for which agencies completed investigations, because the complainant has 30 days to consider the report of investigation before requesting a hearing or a final agency decision without a hearing. *See* 29 C.F.R. § 1614.108(f) (1995). These figures suggest, however, that complainants request a hearing nearly 75 percent of the time.

agency decision without a hearing. The complainant then 30 days to appeal to the EEOC if the agency head finds no discrimination, or grants less than all the relief requested.[178]

If the complainant requests a hearing, the EEOC Regional Office assigns an administrative judge who then permits discovery, holds a closed hearing, issues findings of fact and conclusions of law on the merits of the complaint, and "order[s] appropriate relief where discrimination is found with regard to the matter that gave rise to the complaint."[179] The administrative judge's decision, however, is merely a recommendation to the agency. The agency head has 60 days to issue a final agency decision adopting, rejecting, or modifying

---

[178] 29 C.F.R. § 1614.401 (1995). The filing deadlines, and opportunities to file supporting briefs and memoranda, are as discussed in the context of an appeal from the agency dismissal of a complaint. *See supra* notes 171-174 and accompanying text.

[179] 29 C.F.R. § 1614.109 (1995). The complainant has the burden of persuasion to prove intentional discrimination by preponderant evidence. The complainant may establish a *prima facia* case by demonstrating membership in a protected class under Title VII, the Rehabilitation Act, or the Age Discrimination in Employment Act; that the complainant suffered an employment-related harm; and that other individuals not belonging to that protected class were treated differently. McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). The *prima facie* case creates a presumption of intentional discrimination, *id.*, but the agency can erase the presumption by articulating a legitimate non-discriminatory reason for the action at issue. *Id.*; St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993). The employee may prevail, however, with preponderant evidence that the agency's articulated reason was mere pretext for discrimination. *Id.*

the administrative judge's decision.[180] A disappointed complainant may appeal the final agency decision to the EEOC.[181]

2. Remedies -- The EEOC can award "appropriate remedies, including reinstatement or hiring of employees with or without back pay."[182] Potentially appropriate remedies include declaratory and injunctive relief, retroactive personnel actions, expungement or correction of records, back pay[183] and front pay,[184]

---

[180] 29 C.F.R. §§ 1614.109(g), 1614.110 (1995). Agencies accepted only 41.2 percent of recommended decisions that included findings of discrimination in fiscal year 1994. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 at T-36. They accepted 83.1 percent of recommended decisions that found no discrimination, modified another 16.3 percent, and rejected only .7 percent. *Id.*

[181] 29 C.F.R. §§ 1614.401-1614.407 (1995). The administrative process is far from complete even at this stage. The complainant has 30 days to file a brief in support of the appeal, following which the agency has 30 days to file a brief in opposition. 29 C.F.R. § 1614.403(d) (1995). The EEOC took an average of 185 days to decide appeals during fiscal year 1994. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 at 63. The complainant can request reconsideration within 30 days of an appellate decision finding no discrimination. 29 C.F.R. § 1614.407 (1995). The complainant runs out of administrative remedies only upon denial of the request for reconsideration.

[182] 42 U.S.C. 2000e-16(b) (1988). The agency head also may grant such relief pursuant to the final agency decision.

[183] Back pay recovery is limited to 2 years prior to the date of filing the formal complaint. *See* 42 U.S.C.A. § 2000e-5(b) (1988).

[184] A "front pay" award is appropriate where it is impracticable to place the complainant in the same or substantially equivalent position that the complainant would have held but for the discrimination. The complainant's duty to mitigate is built into this equitable award. *See* Shore v. Federal Express Corp., 42 F.3d 373 (6th Cir. 1994).

restoration of leave, and other equitable relief.[185] Title VII and Rehabilitation Act claimants may recover attorney and expert fees for the administrative process;[186] the ADEA does not specifically provide for attorney fees, but claimants may be able to recover under the Back Pay Act.[187]

The Civil Rights Act of 1991 authorized compensatory damages of up to $300,000 for Federal district court plaintiffs in Title VII and Rehabilitation Act cases.[188] The EEOC has held that these damages are available through the administrative process as well.[189] Administrative judges, however, find only whether damages are appropriate; the agency head determines the appropriate amount.[190] Compensatory damages are not available to victims of age discrimination.[191]

---

[185] 42 U.S.C. § 2000e-5(g),(k) (Supp. V 1993).

[186] 29 U.S.C. § 794a (1994); 42 U.S.C. § 2000e-5(k) (Supp. V 1993).

[187] *See* 5 U.S.C. 5596 (1994). The Back Pay Act authorizes attorney fees to employees who prevail at an administrative hearing regarding an unwarranted or unjustified personnel action that resulted in the loss of pay, if the award of such fees is in the interests of justice. 5 U.S.C. §§ 5596(b)(1)(A)(ii), 7701(g) (1994).

[188] 42 U.S.C. § 1981a (Supp. V 1993).

[189] Jackson v. Runyon, 01923399 (EEOC 1992), *aff'd*, 05930306 (EEOC 1993).

[190] Memorandum from James H. Troy, Director, Office of Program Operations, EEOC, to District Directors and Administrative Judges (October 6, 1993).

[191] *See* 29 U.S.C. § 633a (1994); 42 U.S.C. § 1981a (Supp. V 1993).

*3. **Judicial review*** -- The agency is bound by the EEOC's final order,[192] but a disappointed complainant is entitled to a trial *de novo* in U.S. district court.[193] The plaintiff in a Title VII or Rehabilitation Act civil action who seeks compensatory damages may elect to have a jury determine liability and damages, although equitable relief remains the province of the judge.[194] ADEA plaintiffs present their cases at bench trials.[195]

---

[192] Moore v. Devine, 780 F.2d 1559, 1562-63 (11th Cir. 1986) (final decisions of EEOC binding on agency but not on complainant).

[193]

> Within 90 days of receipt of notice of final action taken by [the respondent agency], or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such [respondent agency] on a complaint of discrimination based on race, color, religion, sex or national origin . . . or after 180 days from the filing of the initial charge with the [respondent agency], until such time as final action may be taken by [the respondent agency], an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by he failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the [respondent agency] shall be the defendant.

42 U.S.C. § 2000e-16(c) (Supp. V 1993). *See* Chandler v. Roudebush, 425 U.S. 840 (1976) (civil action is a trial *de novo*). A complainant who prevails before the EEOC can limit the scope of the civil action to the remedy, preserving the underlying finding of discrimination. Haskins v. Department of the Army, 808 F.2d 1192, 1199 & n.4 (6th Cir.), *cert. denied*, 484 U.S. 815 (1987); Pecker v. Heckler, 801 F.2d 709, 711 n.3 (4th Cir. 1986); Moore v. Devine, 780 F.2d 1559, 1562 (11th Cir. 1986).

[194] 42 U.S.C. 1981a (Supp. V 1993).

[195] *See* 29 U.S.C. § 633a (1994); 42 U.S.C. § 1981a (Supp. V 1993).

A complainant typically has several opportunities to elect between continuing to pursue administrative remedies and filing a civil action: during the 90 day period after an EEOC order affirming the agency's dismissal of all or part of the formal complaint; after 180 days from filing the formal complaint, if the agency has not yet issued a final agency decision and no appeals remain pending; during the 90-day period following the final agency decision; during 90-day period following the EEOC's decision on the appeal of a final agency decision; and after 180 days from filing an appeal to the EEOC if the EEOC has not yet rendered a final decision.[196] Age discrimination complaints enjoy even greater flexibility: the complainant may file a civil action after providing the EEOC 30 days' notice of intent to sue, any time within 180 days of the alleged discriminatory event.[197]

*4. **Class complaints*** -- A group of employees, former employees, or applicants for employment who believe they are aggrieved by a discriminatory agency personnel policy or practice[198] may choose to file a class complaint, analogous to a civil class action.[199] A class agent first must comply with the

---

[196] 29 C.F.R. § 1614.408 (1995).

[197] 29 U.S.C. § 633a (1994). See also 29 C.F.R. 1614.201 (1995) (administrative exhaustion in age discrimination cases).

[198] 42 U.S.C. § 633a(c)-(d) (1988); 29 C.F.R. § 1614.204(a) (1995).

[199] *See* FED. R. CIV. P. 23.

counseling requirements applicable to individual complaints.[200] The agent then may file the complaint within 15 days of receiving a notice of the right to do so.[201] The complaint must identify a discriminatory policy or practice affecting the proposed class.[202]

The agency forwards the complaint to the EEOC, which assigns an administrative judge to review the complaint and recommend acceptance or dismissal. The administrative judge may recommend dismissal for one of the reasons applicable to individual complaints (failure to state a claim upon which relief can be granted, mootness, etc.), or because the complaint does not satisfy the criteria for certification of the class: numerosity of complainants such that joinder is impracticable; questions of fact common to the class; the class agent's claim typical of the class; and the class agent or his representation will adequately protect the interests of the entire class.[203]

The respondent agency has 30 days to accept, reject, or modify the administrative judge's recommendation.[204] The class agent may appeal the agency decision to the EEOC under appellate procedures applicable to individual complaints.[205] An agency that

---

[200] 29 C.F.R. § 1614.204(b) (1995).

[201] 29 C.F.R. 1614.204(c)(2) (1995).

[202] 29 C.F.R. § 1614.204(c)(1)-(2) (1995).

[203] 29 C.F.R. § 1614.204(d)(2) (1995).

[204] 29 C.F.R. § 1614.204(d)(7) (1995).

[205] *See supra* notes 171-174 and accompanying text.

accepts a class complaint, either on the administrative judge's recommendation or on remand from an appeal to the EEOC, must notify the members of the class.[206] The parties then conduct discovery and, barring settlement,[207] litigate the merits at a hearing.[208] The administrative judge reports findings and recommendations to the agency head.[209]

The agency head has 60 days to issue a final agency decision that accepts, rejects, or modifies the administrative judge's recommended decision on the merits of the class complaint.[210] The class agent may appeal the final agency decision to the EEOC.[211] A final finding of class-wide discrimination obligates the agency to discontinue the discriminatory policy or practice and provide individual relief to the class agent, including attorney fees.[212] EEOC regulations prescribe special procedures for other class members to claim individual relief.[213] The regulations also permit the resurrection of individual complaints that were

---

[206] 29 C.F.R. § 1614.204(e) (1995).

[207] Special notification requirements apply to the settlement of class complaints. See 5 C.F.R. § 1614.204(g) (1995).

[208] 29 C.F.R. § 1614.204(h) (1995).

[209] 29 C.F.R. § 1614.204(h)-(i) (1995).

[210] 29 C.F.R. § 1614.204(j) (1995).

[211] 29 C.F.R. § 1614.401(b) (1995).

[212] 29 C.F.R. § 1614.204(l)(1) (1995).

[213] 29 C.F.R. § 1614.204(l)(3) (1995).

subsumed by a class complaint, if the class complaint led to finding of individual discrimination against the class agent but not class-wide discrimination.[214]

The agent may file a class action in Federal district court within 90 days of a final agency decision, if the class does not appeal to the EEOC; within 90 days of a final order of the EEOC on appeal; after 180 days from the date of filing the complaint, if the agency has not issued a final agency decision; or after 180 days from an appeal to the EEOC for which the EEOC has not rendered a final decision.[215]

E. Mixed Cases

The discussion thus far has ignored cases in which an employee with MSPB appeal rights alleges that unlawful discrimination motivated an appealable personnel action. The special procedures that apply to these *mixed* cases have been a magnet for criticism, for reasons that will become all-too apparent. The first of myriad forks in the procedural road is the employee's choice between following the agency complaints process (mixed complaint) and appealing directly to the MSPB (mixed appeal).

---

[214] 29 C.F.R. § 1614.204(l)(2) (1995).

[215] 42 U.S.C. § 2000e-16(c) (Supp. V 1993); 29 C.F.R. § 1614.408 (1995).

*1. **Mixed complaints** --* If the employee elects the discrimination complaints process, the EEOC procedures described above apply through the point of completing the agency investigation.[216] A mixed case complainant, however, has no right to a hearing before an EEOC administrative judge.[217] The agency issues a final agency decision, following which the complainant may either appeal to the MSPB or sue in U.S. district court.[218]

Where the complainant appeals the final agency decision to the MSPB, an administrative judge conducts a hearing on both the civil service and the discrimination aspects of the case[219] and issues a decision within 120 days from the date the complainant filed the appeal.[220] The administrative judge may award any relief that would be available from the MSPB or the EEOC, including compensatory damages where appropriate.[221]

---

[216] *See supra* part I.D.1.

[217] 5 C.F.R. § 7702(a)(2) (1995).

[218] 5 U.S.C. § 7702(a)(2) (1994); 42 U.S.C. § 2000e-16(c) (Supp. V 1993). *See infra* part I.E.4.

[219] 5 U.S.C. § 7702(a)(1)-(2) (1994); *see supra* notes 179-181 and accompanying text (hearing procedures).

[220] 5 U.S.C. § 7702(a) (1994). The administrative judge can remand a discrimination issue to the respondent agency in specified circumstances. *See* 5 C.F.R. § 1201.155 (1995). The initial decision then is due 120 days after the agency completes action on remand. 5 C.F.R. § 1201.156(c) (1995).

[221] Hocker v. Department of Transportation, 63 M.S.P.R. 497, 505 (1994). The MSPB administrative judge, unlike EEOC administrative judges, determines the specific amount of any damages. *Id.*

*2. **Mixed appeals** --* A mixed case appellant bypasses the discrimination complaints process in favor of direct filing with the MSPB.[222] As with mixed complaints, an MSPB administrative judge holds a hearing, issues an initial decision, and awards appropriate relief.

*3. **Administrative review** --* The parties have 35 days to petition the MSPB for review of the administrative judge's initial decision.[223] The OPM can petition if an erroneous decision will have a substantial impact on any civil service law, rule, or regulation under OPM jurisdiction.[224] The final decision binds the agency and the OPM.

The employee has 30 days after receiving the MSPB final decision to petition the EEOC for review.[225] Upon granting a petition for review, the EEOC considers the entire administrative record and either (1) concurs with the MSPB decision; or (2) issues another decision that differs with that of the MSPB because either the MSPB misinterpreted a discrimination law, or

---

[222] 5 U.S.C. § 7702(a)(1) (1994); 5 C.F.R. §§ 1201.151 - 1201.157 (1995).

[223] 5 C.F.R. §§ 1201.113, 1201.152 (1995).

[224] 5 U.S.C. § 7701(e) (1994). Discrimination laws, however, are not civil service laws within the meaning of sections 7701 or 7703. King v. Lynch, 21 F.3d 1084 (Fed. Cir. 1994).

[225] 5 U.S.C. § 7702(b) (1994). The initial decision becomes the final decision absent a timely petition for review. 5 C.F.R. § 1201.113 (1995).

the evidence of record does not support an MSPB decision involving a discrimination law.[226]

EEOC concurrence with the MSPB final decision marks the completion of administrative review, and the EEOC notifies the complainant of the right to file a civil action.[227] The case returns to the MSPB, however, if the EEOC disagrees with the Board.[228] The MSPB can either join the EEOC position or it can disagree and send the case to the Special Panel.[229] The Special Panel consists of an EEOC commissioner, a member of the MSPB, and a Chair appointed by the President with the advice and consent of the Senate.[230] The parties may present oral and written argument.[231] The Special Panel makes the final administrative decision.[232]

4. Judicial review -- The final administrative decision, whether it be from the MSPB, the EEOC, or the Special Panel,

---

[226] 5 U.S.C. § 7702(b)(3) (1994).

[227] 5 U.S.C. § 7702(b)(5)(A) (1994).

[228] 5 U.S.C. § 772(b)(5)(B) (1994).

[229] 5 U.S.C. § 7702(c)-(d) (1994).

[230] 5 U.S.C. § 7702(d)(6) (1994).

[231] 5 U.S.C. § 7703(d)(4) (1994).

[232] 5 U.S.C. § 7703(d)(2) (1994). "The special panel shall refer its decision . . . to the Board and the Board shall order any agency to take any action appropriate to carry out the decision." 5 U.S.C. § 7703(d)(3) (1994).

binds the agency and the OPM.[233] The employee, however, has numerous opportunities to file a civil action for a trial *de novo* in U.S. district court: (a) 120 days after filing a discrimination complaint with the agency, if the agency head has not by then issued a final agency decision;[234] (b) within 90 days of receiving a final agency decision;[235] (c) 120 days after filing an appeal to the MSPB, if the MSPB has not by then issued a final decision;[236] (d) within 90 days of receiving an MSPB final decision;[237] (e) 180 days after filing a petition with the EEOC to review the MSPB decision, if EEOC or MSPB or Special Panel have

---

[233] If the final decision found no discrimination, but held for the complainant on the civil service issue, the OPM technically could appeal the civil service issue to the Court of Appeals for the Federal Circuit if an erroneous interpretation of civil service law, rule, or regulation would have a substantial impact on a civil service law, rule, regulation, or policy directive. 5 U.S.C. § 7703(d) (1994). On the other hand, the employee could pursue the discrimination issue in U.S. district court. If both the OPM and the complainant were to appeal the separate prongs of the case at the same time, the Federal Circuit presumably would transfer the civil service appeal to the district court for review. *Cf.* Williams v. Department of the Army, 715 F.2d 1486 (Fed. Cir. 1983) (*employee* could not bifurcate appeal by pursuing civil service issue in Court of Claims and discrimination issue in district court). No reported cases have passed on this scenario. *Cf.* King v. Lynch, 21 F.3d 1084, 1088-89 (Fed. Cir. 1994) (pointing to the carefully-crafted review scheme for mixed cases as evidence that the OPM cannot appeal erroneous interpretations of discrimination laws).

[234] 5 U.S.C. § 7702(e)(1)(A) (1994).

[235] 42 U.S.C. § 2000e-16(c) (Supp. V 1993).

[236] 5 U.S.C. § 7702(e)(1)(B) (1994).

[237] 5 U.S.C. § 7702(a)(3) (1994).

not by then issued a final decision;[238] (f) within 90 days of receiving EEOC's concurrence with an MSPB final decision, on petition for review;[239] (g) within 90 days of receiving the MSPB's concurrence with an EEOC decision on remand from a granted petition for review;[240] or (h) within 90 days of a Special Panel decision.[241]

The district court judge will review the MSPB or Special Panel decision on the civil service issues for whether the decision was arbitrary, capricious, or abuse of discretion.[242] The plaintiff is entitled to a trial *de novo* on the merits of the discrimination issue, with the same rights and remedies as available to plaintiffs arriving in court via the EEOC process.[243] Although the district courts have exclusive jurisdiction over mixed cases, the Federal Circuit will review the civil service

---

[238] 5 U.S.C. § 7702(e)(1)(C) (1994).

[239] 5 U.S.C. § 7702(b)(5)(A) (1994).

[240] 5 U.S.C. § 7702(c) (1994).

[241] 5 U.S.C. § 7702(d)(2) (1994).

[242] 5 U.S.C. § 7703(b)-(c) (1994); Morales v. Merit Sys. Protection Bd., 932 F.2d 800, 802 (9th Cir. 1991); Romain v. Shear, 799 F.2d 1416 (9th Cir. 1986), *cert. denied*, 481 U.S. 1050 (1987). Of course, if the plaintiff filed the suit prior to obtaining a final decision from the MSPB, then the civil service issue would not be judicially reviewable. *See* 5 U.S.C. § 7703(a) (1994).

[243] 42 U.S.C. § 2000e-16(c) (Supp. V 1993); Chandler v. Roudebush, 425 U.S. 840 (1976). See *supra* part I.D.4 regarding the availability of a jury trial and compensatory damages and other remedies.

issues if the employee expressly abandons the discrimination claim.[244]

F. The Negotiated Grievance Procedure

Labor unions represent about 60 percent of Federal employees.[245] When an agency recognizes a union as the exclusive representative of a collective bargaining unit of agency employees,[246] the parties (agency and union) negotiate a collective bargaining agreement.[247] Every collective bargaining agreement must include a negotiated grievance procedure (NGP) that, with certain exceptions, is the sole avenue for resolving grievances[248] not excluded from its coverage.[249]

---

[244] Davidson v. U.S. Postal Serv., 24 F.3d 223 (Fed. Cir. 1994); Daniels v. U.S. Postal Serv., 776 F.2d 723 (Fed. Cir. 1984).

[245] VICE PRESIDENT AL GORE, CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS: REPORT OF THE NATIONAL PERFORMANCE REVIEW 87 (1993). Unions represent about 80 percent of those employees who are not excluded from collective bargaining by statute or executive order. *Id.*

[246] *See* 5 U.S.C. § 7111 (1994).

[247] *See* 5 U.S.C. § 7117 (1994).

[248] A grievance is any complaint

> (A) by any employee concerning any matter relating to the employment of the employee;
> (B) by any labor organization concerning any matter relating to the employment of any employee; or
> (C) by any employee, labor organization, or agency concerning --
> (i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

The NGP must authorize the agency and the union to invoke binding arbitration as the final step of any grievance.[250] An individual bargaining unit employee, however, has no power to invoke arbitration. This section describes the procedures for four categories of employee grievances: those for which the NGP is the exclusive remedy; discrimination cases for which the employee may elect either the NGP or the EEOC procedure; Chapters 43 and 75 cases for which the employee may elect the NGP or the MSPB procedure, and mixed cases.

1. The negotiated grievance procedure as the exclusive remedy -- A negotiated grievance procedure preempts MSPB appellate jurisdiction over matters other than Chapters 43 and 75 actions, discrimination cases, and whistleblower IRAs, if the NGP does not exclude the particular type of dispute from its

---

> (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

5 U.S.C. § 7103(a)(9) (1994).

[249] 5 U.S.C. § 7121(a) (1994). The parties, (management and the union), bargain over the scope of the NGP, and can agree to expressly exclude particular matters from coverage. Disputes involving the following are statutorily excluded from the NGP's coverage: (1) prohibited political activities; (2) retirement, life insurance, or health insurance; (3) suspension or removal for national security reasons; (4) an examination, certification, or appointment; and (5) a classification of any position which does not result in the reduction in grade or pay of an employee. 5 U.S.C. § 7121(c) (1994).

[250] 5 U.S.C. § 7121(b)(3)(C) (1994).

coverage.[251] A bargaining unit employee who otherwise could appeal to the MSPB regarding the denial of a within-grade pay increase, for example, must use the NGP if it does not exclude such grievances from its coverage.

The grievant cannot obtain review of the agency decision unless the union invokes arbitration. Where the union invokes arbitration, the parties present the matter to a private arbitrator selected in accordance with the NGP. Either party may file exceptions within 30 days of the arbitrator's decision.[252] The Federal Labor Relations Authority has jurisdiction over these exceptions, and will affirm the arbitrator unless "the award is deficient -- (1) because it is contrary to any law, rule, or regulation; or (2) on other grounds similar to those applied by Federal courts in private sector labor-management relations."[253] The FLRA decision on exceptions is final and not subject to

---

[251] 5 U.S.C. § 7121 (1994); 5 C.F.R. § 1201.3(b)-(c) (1995).

[252] 5 U.S.C. § 7122(b) (1994).

[253] 5 U.S.C. § 7122(a) (1994). The following constitute "grounds similar:" the arbitrator exceeded her authority by deciding an issue not presented; the award does not draw its essence from the collective bargaining agreement, Naval Mine Warfare Eng'g Activity and National Ass'n of Gov't Employees, 39 F.L.R.A. 1207 (1991); the award is impossible to implement because it is incomplete, ambiguous, or contradictory, Delaware Nat'l Guard and Association of Civilian Technicians, 5 F.L.R.A. 50 (1981); the award was based on a gross mistake of fact that changed the result, Redstone Arsenal and American Fed'n of Gov't Employees, 18 F.L.R.A. 374 (1985); the arbitrator was biased or partial, Department of the Air Force, Hill Air Force Base and American Fed'n of Gov't Employees, 39 F.L.R.A. 103 (1991); and the arbitrator refused to consider pertinent and material evidence, *Id.*

judicial review unless the case involves an unfair labor practice.[254]

---

[254] [254] 5 U.S.C. § 7123(a) (1994). Management commits an unfair labor practice by interfering with an employee's exercise of his rights under the labor relations statute; by providing unlawful assistance to another union; by refusing to bargain in good faith with the recognized union; by refusing to cooperate in required impasse-resolution procedures; or by otherwise violating the labor relations statute. 5 U.S.C. § 7116(a) (1994). The union commits an unfair labor practice by failing to fairly represent a covered employee, by interfering with any employee's exercise of rights under the labor relations statute, or retaliating against him therefor; by causing management to unlawfully discriminate against an employee; by refusing to bargain in good faith; by refusing to cooperate in required impasse-resolution procedures; by calling for or participating in a strike or other job action; by picketing in such a manner as to interfere with agency operations; or by otherwise violating the labor relations statute. 5 U.S.C. § 7116(b) (1994). Most arbitration awards will not implicate an unfair labor practice that would render the FLRA decision judicially reviewable.

The agency must comply with an arbitration award that the FLRA has affirmed; failure to do so is an unfair labor practice. 5 U.S.C. § 7116(a)(5) (1994) (refusal to bargain in good faith).

*2. **Discrimination grievances*** -- An employee alleging unlawful discrimination may choose between the NGP and the EEOC process unless the NGP excludes discrimination complaints.[255] The employee elects the EEOC process by contacting the agency EEO counselor; filing a written grievance constitutes election of the NGP.[256] The election is binding.[257]

An employee who elects the NGP follows the grievance procedure through all the steps up to arbitration. If the union refuses to invoke arbitration, the grievant may appeal the agency

---

The FLRA adjudicates unfair labor practice cases through its own administrative litigation process. *See* 5 U.S.C. § 7118 (1994); 5 C.F.R. Part 2423 (1995). The agency cannot re-litigate the merits of an underlying arbitration award as a defense to an unfair labor practice charge, either before the FLRA or the U.S. courts of appeals on judicial review. *See* Griffith v. FLRA, 842 F.2d 487 (D.C. Cir. 1988) (merits of arbitration awards appealed to FLRA are not further reviewable in any Federal court unless arbitrator's decision and FLRA's affirmance is challenged as unconstitutional or falls within the narrow bounds of the Leedom v. Kyne, 358 U.S. 184 (1958)); Department of Justice v. FLRA, 792 F.2d 25 (2d Cir. 1986).

[255] [255] 5 U.S.C. § 7121(d) (1994).

[256] 5 U.S.C. § 7121(d) (1994).

[257] *Id.*

decision to the EEOC,[258] which will review the administrative record as it would review any final agency decision. The grievant may bring a civil action in Federal district court within 90 days of receiving the EEOC's final decision on appeal.[259]

The grievant may appeal an arbitration decision to the EEOC.[260] The union and the agency may file exceptions with the FLRA.[261] The FLRA decision binds the agency, but the grievant may appeal that decision to the EEOC.[262] The grievant also enjoys the opportunity to file a civil action at most every fork in the road, as previously described.

3. Chapters 43 and 75 grievances -- An employee with appeal rights may elect between the MSPB appellate process and the NGP to contest a Chapter 43 or 75 action,[263] unless the NGP excludes these matters from its coverage.[264] Review jurisdiction

---

[258] 5 U.S.C. § 7121(d) (1994); 29 C.F.R. § 1614.401(c) (1995).

[259] 42 U.S.C. § 2000e-16(c) (Supp. V 1993); 29 C.F.R. § 1614.408(c) (1995).

[260] 5 U.S.C. § 7121(d) (1994); 29 C.F.R. § 1614.401(c) (1995).

[261] 5 U.S.C. § 7122 (1994).

[262] 5 U.S.C. § 7121(d) (1994); 29 C.F.R. § 1614.401(c) (1995).

[263] *See supra* notes 58-70 and accompanying text.

[264] 5 U.S.C. § 7121(e) (1994).

for Chapters 43 and 75 grievances lies with the Court of Appeals for the Federal Circuit; the MSPB has no jurisdiction.[265]

The Federal Circuit reviews the arbitrator's decision "in the same manner and under the same conditions as if the matter had been decided by the Board."[266] The agency, therefore, cannot appeal an arbitration decision even if it is based on an erroneous interpretation of law. The OPM can appeal in a substantial impact case,[267] but the Federal Circuit has discretion to dismiss if it considers the impact insubstantial.[268] The agency can then be left with implementing an unlawful remedy.[269]

---

[265] 5 U.S.C. § 7121(f) (1994).

[266] 5 U.S.C. § 7121(f) (1994). The standard of review, therefore, is whether the arbitrator's decision was arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 7703(c) (1994). The court will consider the traditional labor law policy of deference to arbitrators' decisions, Devine v. Brisco, 733 F.2d 867, 871 (Fed. Cir. 1984); but recognizes that "[j]udicial deference to an arbitral award may be inappropriate when the award is in apparent conflict with a federal statute that is distinct from the operation of the collective bargaining unit." Devine v. Nutt, 718 F.2d 1048, 1053 (Fed. Cir. 1983), *rev'd on other grounds sub nom.* Cornelius v. Nutt, 472 U.S. 648 (1985).

[267] *See supra* note 55 and accompanying text.

[268] *See* 5 U.S.C. § 7703(d) (1994) ("The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.").

[269] *See* Horner v. Garza, 832 F.2d 151 (Fed. Cir. 1987). The court referred to the arbitrator's decision as "*ultra vires* and unenforceable," 832 F.2d at 151, but failed to grasp that the agency has no other forum in which to challenge the enforceability. The FLRA has no jurisdiction to hear exceptions. 5 U.S.C. § 7122(a) (1994). The agency commits an unfair labor practice if it fails to implement the arbitration award, 5 U.S.C. § 7116(a)(5) (1994); and it cannot re-litigate the merits of the arbitration award in its defense of the unfair labor practice charge before the FLRA or the U.S. Court of Appeals. *See supra*

*4. **Mixed grievances** --* Suppose the agency imposes a Chapter 43 or 75 action on an employee who has MSPB appeal rights, and the employee wishes to raise an affirmative defense of unlawful discrimination via the NGP. The mixed grievance is third corner of the mixed case Bermuda triangle. The employee may file a mixed grievance (if the NGP does not exclude mixed cases), a mixed complaint, or a mixed appeal.[270]

A disappointed grievant cannot obtain MSPB review if the union does not invoke arbitration,[271] but may abandon the civil service issue and appeal the agency decision on the discrimination claim to the EEOC.[272] The grievant may follow the EEOC appeal with a trial *de novo* in U.S. district court on the merits of the discrimination issue.[273]

Neither the agency nor the OPM can obtain administrative or judicial review of an arbitrator's decision on a mixed grievance. The grievant may appeal to the MSPB, which will review the

---

note 254 and accompanying text.

[270] 5 U.S.C. § 7121(d) (1994).

[271] Mawson v. Department of the Navy, 48 M.S.P.R. 318, 322 (1991) ("[T]he final decision rendered pursuant to a negotiated grievance procedure, which is then appealable to the Board under 5 U.S.C. § 7121(d) (1994), is the arbitrator's decision in cases where the grievance procedure provides for arbitration as a last resort."). Every negotiated grievance procedure provides for arbitration as a last resort. 5 U.S.C. § 7121(a) (1994).

[272] 29 C.F.R. § 1614.401(c) (1994).

[273] 42 U.S.C. § 2000e-16(c) (Supp. V 1993); 29 C.F.R. § 1614.408(c)-(d) (1995). The agency cannot appeal the EEOC decision.

decision for whether the arbitrator erred in interpreting a civil service law, rule, or regulation.[274] The grievant may appeal to the EEOC if not satisfied with the MSPB decision, triggering the back and forth process that leads ultimately to the Special Panel.[275] Of course, a civil action in U.S. district court is an option at various stages following the arbitration decision.[276]

5. Other prohibited personnel practices -- The alleged victim of a prohibited personnel practice other than discrimination, in a case other than a Chapter 43 or 75 action, may pursue the matter through the NGP or the OSC.[277] The FLRA has jurisdiction to review exceptions from arbitration awards.[278] The FLRA decision generally is not judicially reviewable.[279]

---

[274] Robinson v. Department of Health and Human Servs., 30 M.S.P.R. 389 (1986). The term "civil service" apparently includes, for the purposes of appeals under 5 U.S.C. section 7121(d), discrimination laws. "[T]he Board will decide both discrimination issues and other appealable issues in conducting its limited scope of review of arbitration decisions under 5 U.S.C. § 7121(d)." 30 M.S.P.R. at 398.

[275] 5 U.S.C. § 7121(d) (1994). *See supra* part I.E.3.

[276] *See supra* part I.E.4.

[277] 5 U.S.C. § 7121(g) (1994). A whistleblower has the further option to bring an IRA upon exhaustion of administrative remedies with the OSC. *See supra* notes 71-74 and accompanying text.

[278] 5 U.S.C. § 7122 (1994).

[279] Griffith v. FLRA, 842 F.2d 487 (D.C. Cir. 1988).

II. The Roots, Successes, and Flaws of the 1978 Civil Service Reforms

A flow chart depicting the various administrative processes for resolving Federal-sector employment disputes would be incomprehensible to most practitioners, let alone the average Federal employee with no legal training. This part examines how and why that system arose, and evaluates how well or poorly the system serves the objectives that prompted reform in 1978.

A. The Civil Service Commission

The Pendleton Act of 1883[280] created the Civil Service Commission to implement a merit system for hiring Federal civil servants, and to stamp out the political spoils system that had prevailed previously. The CSC's responsibilities expanded over time to include implementing standards and procedures for removal, position classification, supervision of efficiency ratings, and retirement matters, moving "beyond patronage control to modern personnel administration in the Federal Government."[281] Executive Order 9830 charged the CSC with exercising and providing "leadership in personnel matters throughout the Federal service."[282]

By 1978 the CSC's responsibilities extended to virtually all aspects of personnel management, including merit staffing

---

[280] Civil Service Act of 1883, 22 Stat. 403.

[281] S. REP. No. 969, 95th Cong., 2nd Sess. 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2727.

[282] Exec. Order No. 9830, 12 Fed. Reg. 1259 (1947).

(hiring, promoting, removing); performance evaluation; pay and benefits; retirement and health insurance; labor-management relations; and equal employment opportunity and affirmative action.[283] The CSC was a policy maker, a management consultant, a merit protector, and an adjudicator of employment disputes. Its performance as the master personnel agency, however, came under scrutiny.

A CSC evaluation team reviewing personnel management operations in a regional office of the General Services Administration in 1973 received allegations of political patronage in the hiring process.[284] The subsequent inquiry revealed abuses that could occur only with the complicity of officials in the CSC's Bureau of Recruiting and Examining.[285]

> To counter these assaults, there ha[d] gradually developed a bewildering array of complex protective procedures and additional checks and balances. Complexity ha[d] also been increased through procedural safeguards for various disadvantaged groups where rights ha[d] been too long ignored. The resultant time-consuming and confusing red tape undermine[d] confidence in the merit system. . . .
>
> Ironically, the entangling web of safeguards spun over the years often fail[ed] to protect against major political assaults and cronyism.[286]

---

[283] *See* 1 PERSONNEL MANAGEMENT PROJECT, FINAL STAFF REPORT (Dec. 1977).

[284] *See* SHIGEKI J. SUGIYAMA, PROTECTING THE INTEGRITY OF THE MERIT SYSTEM 3 (1985).

[285] *Id.* at 8-12.

[286] Letter from Dwight A. Ink to Alan K. Campbell and Wayne Granquist (Dec. 20, 1977), *in* 1 PERSONNEL MANAGEMENT PROJECT, FINAL STAFF REPORT (Dec. 1977).

These bewildering procedures, the confusing red tape, and the CSC's structural conflict of interest and resulting pro-management bias attracted the attention of a new presidential administration.

B. The Personnel Management Project

President Carter assigned his new CSC Chairman to chair the Personnel Management Project (PMP), which began on May 27, 1977.[287] The PMP charter was to examine then-current personnel policies, processes, and organization for areas of improvement, and to recommend necessary changes to achieve that improvement.[288] Nine task forces, comprised primarily of career Federal employees, investigated and reported on every aspect of the civil service system.[289] The task force reports and the final staff report became the foundation for Reorganization Plan Numbers 1 and 2, and for the Civil Service Reform Act. Two task forces addressed Federal-sector employment litigation directly.

---

[287] SHIGEKI J. SUGIYAMA, PROTECTING THE INTEGRITY OF THE MERIT SYSTEM 13 (1985).

[288] *Id.*

[289] The 9 task forces were: (1) Composition and Dynamics of the Federal Workforce; (2) Senior Executive Service; (3) Staffing Process: Entry to and Departure from the Civil Service; (4) Equal Employment Opportunity and Affirmative Action; (5) Job Evaluation, Pay, and Benefit Systems; (6) Labor-Management Relations; (7) Development of Employees, Supervisors, Managers, and Executives; (8) Roles, Functions, and Organization for Personnel Management; and (9) Federal, State, and Local Interaction in Personnel Management. 2 PERSONNEL MANAGEMENT PROJECT, APPENDICES TO THE FINAL STAFF REPORT (Dec. 1977).

1. Equal employment opportunity -- Task Force 4 (Equal Employment Opportunity and Affirmative Action) confronted widespread criticism of the discrimination complaints process as "biased against complainants; . . . too lengthy, repetitive, complex, and confusing; and . . . without protection for the rights of those who had been accused or named as alleged discriminating officials."[290] Other criticisms included that Federal complainants' rights were inferior to those of private-sector complainants;[291] inflexible, restrictive procedures hindered complainants' exercise of the rights they had; defendant agencies controlled the complaints process; complainants had insufficient access to information; defendant agencies decided whether discrimination existed; the CSC Appeals Review Board rarely found for complainants; class complaints procedures were inadequate; and agencies rarely disciplined discriminating

---

[290] U.S. GENERAL ACCOUNTING OFFICE, CIVIL SERVICE REFORM: DEVELOPMENT OF 1978 CIVIL SERVICE REFORM PROPOSALS 36 (1988) (remarks of Harriet Jenkins, Task Force on Equal Employment Opportunity and Affirmative Action) (transcript of a seminar held jointly by the GAO and the Senate Governmental Affairs Subcommittee on Federal Services, Post Office, and Civil Service on March 31, 1988).

[291] 2 PERSONNEL MANAGEMENT PROJECT, APPENDICES TO THE FINAL STAFF REPORT app. IV at 19 (Dec. 1977). The task force cited the following reports as significant: "'Behind the Promises: Equal Employment Opportunity in the Federal Government, by Ralph Nader's Public Interest Research Group (1972); (2) 'The Federal Civil Rights Enforcement Effort - To Eliminate Employment Discrimination,' by the U.S. Commission on Civil Rights (1975); and 'Staff Report on Oversight Investigation of Federal Enforcement of Equal Employment Opportunity Laws,' prepared for the Subcommittee on Equal Opportunities of the Committee on Education and Labor, U.S. House of Representatives (1976)." *Id.*

officials.[292] Even the CSC, in a 1974 report from a task force headed by its Deputy Executive Director, "questioned the impartiality of discrimination advice provided to Federal employees by persons who are the functional extensions of management."[293]

Task Force 4 conducted outreach meetings with "a wide variety of persons and groups" and observed general agreement that the complaints system was too long and complex; that EEO counselors were relatively ineffective due to poor training and low rank; and that an independent and impartial body should hear complaints and other appeals.[294] The task force recommended elimination of the counseling process; arbitration of complaints; EEOC review; and the right to a trial *de novo* in U.S. district court following a final administrative decision.[295]

2. Organizing for merit protection -- Task Force 8 (Roles, Functions, and Organization for Personnel Management) also found an organizational conflict of interest in the CSC's "serving simultaneously as management agent for an elected partisan official and as protector of the Federal personnel system against

---

[292] *Id.* app. IV at 19-20 (quoting from *Staff Report on Oversight Investigation of Federal Enforcement of Equal Employment Opportunity Laws*, prepared for the Subcomm. on Equal Opportunities of the Comm. on Education and Labor, U.S. House of Representatives 12-13 (1976)).

[293] *Id.* app. IV at 21.

[294] *Id.* app. IV at 23.

[295] *Id.* app. IV at 26.

partisan abuse, and acting concurrently as a staff agency assisting other agencies in personnel management and as a 'neutral' third-party adjudicatory body."[296] The task force considered "that part of the merit protection role that concerns the adjudication of disputes between employees and agency management . . . to be both in fact and in appearance incompatible with the responsibility of a central management staff agency to assist operating departments and agencies in managing the workforce."[297]

Task Force 8 recommended dividing CSC functions and authorities between a Federal Personnel Management Agency and a Merit Systems Review Board, in much the way that the OPM and MSPB ultimately absorbed them (including the creation of a Special Counsel).[298] Unlike Task Force 4, however, Task Force 8 recommended assigning adjudicatory responsibility to the MSPB, and assigning the OPM responsibility for the policy and supervisory functions of the Federal EEO and Affirmative Action programs.[299]

---

[296] *Id.* app. VIII at 1.

[297] *Id.* app. VIII at 2.

[298] *Id.* app. VIII at 4-11.

[299] *Id.* app. VIII at 13-14.

3. The Personnel Management Project leadership -- The PMP leadership[300] sought to replace bias and complexity with impartiality and simplicity.

> Additional procedures will add little in the way of protection, and will result primarily in more red tape. In lieu of more process, the staff has concluded that more meaningful safeguards can be provided by greater organizational insulation of the appeals and investigative functions.
>
> Employees with complaints now face a confusing array of possibilities -- appeal vs. grievance vs. discrimination complaint. They also face a bewildering tangle of rules, regulations and procedures as well as deadlines to be met to avoid losing an appeal on procedural grounds.[301]

The PMP leadership recommended the Task Force 8 approach to jurisdiction over discrimination complaints.[302] An independent agency, the "Merit Protection Board," would be "the keystone of the proposed safeguarding of merit principles."[303] The leadership also recommended reforms to "clarify and simplify the procedures for appeals, grievance, and discrimination complaints to make them easier to understand and to use."[304]

---

[300] I.e. the chairman, vice-chairman, executive director, and deputy executive director. 1 PERSONNEL MANAGEMENT PROJECT, FINAL STAFF REPORT ii (Dec. 1977).

[301] *Id.* at 5-6.

[302] *Id.* at 6-7.

[303] *Id.* at 6.

[304] *Id.* Appeals not involving discrimination would be simple: the employee appeals following the agency decision; the MPB provides a hearing and decision; the agency implements the MPB decision. *Id. at 74.*

The discrimination complaints process would consist of 5 steps: (1) filing with the agency; (2) fact finding and conciliation attempts by the agency EEO director; (3) final agency decision; (4) appeal to MPB (optional); (5) civil suit in

Recommended Merit Protection Board functions included investigating and correcting incidents of prohibited political activities; adjudicating employee appeals "related to virtually all types of personnel actions;" investigating and deciding discrimination complaints; and reviewing other personnel systems for compliance with merit principles.[305] Merit Protection Board jurisdiction over employment discrimination cases manifested the PMP leadership's recognition that unlawful discrimination is inimical to a merit system.[306] The leadership rejected Task Force

---

U.S. district court. *Id.*

A negotiated grievance procedure would be a covered employee's exclusive appeals route for all matters within its scope, but discrimination complaints would not be grievable. Filing a discrimination complaint (appealable to the MPB) would foreclose any other type of grievance or appeal on the same issues. *Id.* at 60-61.

[305] *Id.* at 55.

[306] The Final Staff Report did not articulate a list of merit principles or prohibited personnel practices, such as those specified by the CSRA, but the Project leadership clearly considered discrimination-free employment a merit principle.

> The main idea of the merit system is to hire people into the civil service on the basis of their qualifications, and to advance people and retain them in the service on the basis of their relative performance on the job and their ability to take on more responsible work. No other considerations should apply in hiring, promoting, or retaining career employees -- not political party, race, color, sex, religion, national origin, marital status, age, handicap, or other factors unrelated to the job.

Id. at 51. "As a fundamental part of protecting merit principles, employees individually need strong protection from arbitrary or capricious personnel actions and from discrimination based on politics, race, color, sex, religion, national origin, age, marital status, or handicap." *Id.* at 53.

4's recommendation (regarding EEOC jurisdiction) "in order to establish a single organizational unit to resolve virtually all types of complaints from Federal employees."[307]

The CSC's process suffered from complexity due to multiple organizations' involvement with appeals, confusing patterns jurisdiction, and overlapping avenues of appeal.[308] The PMP leadership sought to replace that with a clear avenue of relief for any particular complaint, and a simple and timely appeals process.[309] Merit Protection Board jurisdiction over discrimination complaints was central to this effort.[310]

C. Implementing Personnel Management Project Recommendations

---

[307] *Id.* at 73. Those favoring the Task Force 4 approach pointed to a perceived conflict between protecting the merit system and bringing about changes in merit procedures to accomplish equal employment opportunity (EEO) objectives; a divergence between private sector and Federal sector EEO programs; and the EEOC's success in spurring private-sector progress through enforcement and threat of enforcement. *Id.* at 237-38. The Project leadership, however, were "not persuaded that a transfer of Title VII responsibility to the Equal Employment Opportunity Commission [was] either necessary or desirable." *Id.* at 238. They envisioned the OPM as a powerful entity capable of implementing a vigorous EEO program; they discerned a conflict of interest to be created by vesting the EEOC with both EEO program responsibility and complaints adjudication responsibility, similar to that from which the CSC suffered; and they believed that management involvement in the EEO program was crucial to success in the Federal work place. *Id.* at 238-39.

[308] *Id.* at 58.

[309] *Id.* at 60-61.

[310] *Id.* at 73.

Even before PMP leadership had signed-off on the Final Staff Report, another group of subject-matter experts assembled to develop reorganization plans and proposed legislation to implement PMP recommendations.[311]

*1. **Reorganization Plan No. 1*** -- President Carter adopted Task Force 4's recommendation for EEOC jurisdiction. He sent Reorganization Plan Number 1 to Congress, addressing equal employment opportunity exclusively, a week before he submitted proposed civil service reform legislation.[312] The President expressed concern about conflicts of interests, disparities between Federal and private employees' rights, and uniformity of equal employment opportunity standards.[313] Accusing the CSC of

---

[311] SHIGEKI J. SUGIYAMA, PROTECTING THE INTEGRITY OF THE MERIT SYSTEM 18 (1985).

[312] President Carter submitted Reorganization Plan No. 1 on February 23, 1978; he submitted proposed reform legislation on March 2. *See* Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978), *reprinted in* 5 U.S.C. app. at 1574 (1994), *and in* 92 Stat. 3781 (1978); SHIGEKI J. SUGIYAMA, PROTECTING THE INTEGRITY OF THE MERIT SYSTEM 1 (1985).

[313]

> Transfer of the Civil Service Commission's equal employment opportunity responsibilities to EEOC is needed to ensure that: (1) Federal employees have the same rights and remedies as those in the private sector and in State and local government; (2) Federal agencies meet the same standards as are required of other employers; and (3) potential conflicts between an agency's equal employment opportunity and personnel management functions are minimized. The Federal government must not fall below the standard of performance it expects of private employers.

Message of the President, *supra* note 17.

lethargy "in enforcing fair employment requirements within the Federal government"[314] he transferred all the CSC's equal employment opportunity responsibilities to the EEOC, including complaint adjudication.[315]

The House and Senate committee reports on Reorganization Plan 1 reveal the contemporary concerns of Congress. The House cited the CSC's conflict of interest; the need for uniform guidelines, standards, rules, and procedures applicable to the Federal and private sectors; the burden CSC rules and procedures imposed on Federal employees; undue delay in complaints processing; the EEOC's expertise in employment discrimination matters; and the need to foster employee confidence in the fairness of the system.[316]

---

[314] *Id.*

[315] Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978), *reprinted in* 5 U.S.C. app. at 1574 (1994), *and in* 92 Stat. 3781 (1978). President Carter transferred Equal Pay Act and Age Discrimination in Employment Act enforcement from the Department of Labor and the Civil Service Commission to the EEOC. These actions reduced "from fifteen to three the number of Federal agencies having important equal employment opportunity responsibilities under Title VII of the Civil Rights Act of 1964 and Federal contract compliance provisions." Message of the President, *supra* note 17.

[316]

> Commission rules and procedures governing complaints are said to be more burdensome to Federal employees than those issued by the EEOC for employees in the non-Federal sectors. Despite a statutory limitation of 180 days for the processing of complaints by government employees, the Government-wide average for the processing of complaints was 398 days in fiscal year 1976.
> . . .
> Of great importance in evaluating the merit of this transfer is the built in conflict of

The Senate pointed to

> [i]nconsistent standards of compliance, particularly between the public and private sectors; [d]uplicative, inconsistent paperwork requirements and investigative efforts; [c]onflicts within agencies between their program responsibilities and their responsibility to enforce the civil rights laws; [c]onfusion on the part of workers about how and where to seek redress; [and] [l]ack of accountability.[317]

Both the House and the Senate noted the overlap between EEOC jurisdiction and that proposed for the MSPB.[318] Senate reservations about the contemplated scheme for sharing jurisdiction[319] forced President Carter to agree to delay

---

> interest that exists within the Civil Service Commission.
>
> . . .
>
> The advantages in transferring the equal employment function of the Civil Service Commission to the Equal Employment Opportunity Commission are numerous and clear. Most important is the fact that the EEOC is an agency within the Federal Government which has developed experience and expertise in the field. It is independent of other inconsistent commitments and can freely devote itself to its mission. Guidelines and standards will be produced that will be harmonious for both Federal and private employment and Federal employees with equal opportunity complaints will be subject to the same rules and procedures as employees in the private sector. Confidence of Federal employees in the fairness of government personnel practices will be enhanced.

H.R. REP. No. 1069, 95th Cong., 2nd Sess. 5 (1978).

[317] S. REP. No. 750, 95th Cong., 2d Sess. 1-2 (1978).

[318] H.R. REP. No. 1069, 95th Cong., 2d Sess. 6 (1978); S. REP. No. 750, 95th Cong., 2nd Sess. 10-12 (1978).

[319]

> The jurisdictional overlap between the EEOC and the Merit Protection Board, combined with the broadly conceded difficulty separating merit from discrimination issues when they are raised in the

implementation pending Congress' consideration of his proposed reform legislation.[320] Congress responded with the mixed case procedure described in part I.[321]

2. The Civil Service Reform Act and Reorganization Plan Number 2 -- The drafters used Reorganization Plan Number 2 to redesignate the Civil Service Commission as the Merit Systems Protection Board and to prescribe, to the extent possible, the organization and functions of the newly-created OPM, MSPB, and

---

> same appeal, leads the committee to conclude that the Administration's proposal in section 3 would ultimately render more difficult the achievement of timely justice for Federal employees under Merit System principles or under title VII of the Civil Rights Act.
>
> . . .
>
> Under the proposed systems of appeals, the Merit Protection System Board [sic] alone would decide cases in which only merit issue were involved; the EEOC would handle cases where only discrimination issues were raised; and in mixed cases, the MSPB would make an initial determination but this determination could be overruled by the EEOC. This division of responsibilities could produce simultaneous or sequential appeals ending up with quite different final determinations.

S. REP. No. 750, 95th Cong., 2nd Sess. 10-12 (1978).

[320] Letter from President Carter to Senator Abraham A. Ribicoff (undated) *reprinted in* S. REP. No. 750, 95th Cong., 2nd Sess. 17-18 (1978).

[321] Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 205, 92 Stat. 1111, 1140-43 (codified as amended at 5 U.S.C. § 7702 (1994); *see supra* part I.E.3.

OSC.[322] The proposed legislation established for the first time an express set of statutory merit principles and prohibited personnel practices.[323] It also covered, *inter alia*, creation of the Senior Executive Service, due process for misconduct-based and performance based actions, merit staffing, employee compensation, and labor-management relations.[324]

President Carter sent the proposed legislation to Congress on March 2, 1978,[325] and followed two months later with Reorganization Plan Number 2.[326] Neither legislative body vetoed the reorganization plan.[327] The Senate passed one version of the CSRA on August 24; the House passed another on September 23. The Senate and House agreed to the conference report on October 4 and 6 respectively, and the President signed the CSRA into law on

---

[322] *See* Reorg. Plan No. 2 of 1978, 3 C.F.R. 323 (1978), *reprinted in* 5 U.S.C. app. at 1577 (1994), *and in* 92 Stat. 3783 (1978); SHIGEKI J. SUGIYAMA, PROTECTING THE INTEGRITY OF THE MERIT SYSTEM 20 (1985).

[323] U.S. Civil Service Commission, draft of the Civil Service Reform bill dated January 10, 1978, *reprinted in* SHIGEKI J. SUGIYAMA, PROTECTING THE INTEGRITY OF THE MERIT SYSTEM 22-25 (1985).

[324] *See* SHIGEKI J. SUGIYAMA, PROTECTING THE INTEGRITY OF THE MERIT SYSTEM 20 (1985).

[325] *Id.* at 1.

[326] Reorg. Plan No. 2 of 1978, 3 C.F.R. 323 (1978), *reprinted in* 5 U.S.C. app. at 1577 (1994), *and in* 92 Stat. 3783 (1978).

[327] SHIGEKI J. SUGIYAMA, PROTECTING THE INTEGRITY OF THE MERIT SYSTEM 42 (1985). *See supra* notes 4, 17 regarding the ill-starred legislative veto provision of the Reorganization Act.

October 13, 1978,[328] less than 8 months after he submitted the proposed legislation.

The CSRA generally reflected the concerns of the Personnel Management Project. It codified merit principles; provided for an independent MSPB and OSC; protected whistleblowers; vested the OPM with supervisory powers over executive branch personnel management; established a new performance appraisal system and standards for performance-based removal; prescribed due process for disciplining and removing employees; created a Senior Executive Service; created a merit pay system for certain managers; authorized the OPM to test new approaches for personnel administration; and created a statutory basis for Federal labor-management relations.[329]

D. Good Intentions; Unmet Expectations

The preceding discussion highlighted the following general concerns that inspired the reforms of 1978:

- the CSC's conflict of interest and resulting bias against complainants
- confusing patterns of jurisdiction, with overlapping avenues of appeal
- procedures described variously as complex, confusing, burdensome, and bewildering

---

[328] *Id.* at 1.

[329] *See* S. REP. No. 969, 95th Cong., 2nd Sess. 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2724. Congress eliminated the merit pay system in 1993. Performance Management and Recognition System Termination Act, Pub. L. No. 103-89, 107 Stat. 981 (1993).

- inordinate delay
- agency control of the complaints process; ineffective counselors; unsatisfactory investigations
- disparity between the rights and remedies of Federal employees and private sector employees
- lack of employee confidence in the fairness of the system

Eighteen years later, many of these concerns still linger. The Senate considered legislation in 1992 and 1993 to restructure the Federal employment discrimination complaints process.[330] The Committee on Governmental Affairs found:

- agencies controlling the complaints process have an inherent conflict of interest[331]
- complicated procedures and overlapping jurisdiction for mixed cases[332]
- insufferable delays[333]
- ineffective counselors and unsatisfactory investigations[334]
- lack of employee confidence in the fairness of the system[335]

How far have we really come since 1978?

---

[330] Federal Employee Fairness Act of 1993, S. 404, 103rd Cong., 1st Sess. (1993); Federal Employees Fairness Act of 1992, S. 2801, 102nd Cong., 2nd Sess. (1992).

[331] S. REP. No. 484, 102nd Cong., 2nd Sess. 7 (1992).

[332] *Id.* at 10.

[333] *Id.* at 7.

[334] *Id.* at 8-9.

[335] *Id.* at 8.

1. Discrimination cases --

a. Complaints processing -- For all the criticism directed at the CSC model for discrimination complaints processing, one might have expected the EEOC to devise a new system that was more fair, efficient, and user-friendly. Instead, the EEOC adopted CSC procedures wholesale, merely substituting itself for the CSC as the adjudicator.[336] Amendments over the years never diverted the EEOC process from the CSC model: the agency counsels on, accepts or dismisses, investigates, and decides discrimination complaints; the employee may appeal to the EEOC.[337] As the Senate Government Affairs Committee pointed out, these procedures preserve the agency conflict of interest that undermines the effectiveness and perceived or real fairness of the entire process.[338]

b. Delay -- Complex, inefficient procedures exact additional costs beyond confusion and frustration; they beget delay. Delay prolongs uncertainty, creates stress, and generates opportunities for disputes to snowball into reprisal complaints, the leading basis of discrimination allegations in fiscal year

---

[336] Equal Employment Opportunity in the Federal Government, 43 Fed. Reg. 60,900 (1978) (codified at 29 C.F.R. Part 1613 (1979)).

[337] *See* 29 C.F.R. Parts 1613, 1614 (1995); *cf.* 5 C.F.R. Part 713 (1978). The Part 1614 procedures, which became effective on October 1, 1992, tinker at the fringes but adhere to the basic CSC model.

[338] *See supra* notes 331-335 and accompanying text.

1994.[339] Witnesses transfer, quit, retire, or die. Those still available by the time of a hearing may forget what they once knew about the case, or become frustrated by repeated questioning from EEO counselors, investigators, and rotating party counsel during the interminable prelude to a hearing. Unresolved discrimination complaints do not improve with age.

How protracted is the process? Consider the open complaints inventory for fiscal year 1994. Complaints pending acceptance or dismissal had been open an average of 196 days; those pending agency investigation averaged 257 days; those pending a hearing averaged 377 days; and those pending a final agency decision averaged 466 days.[340] Although the average processing time for a complaint to proceed from filing to final agency decision was 356 days,[341] it was another story for cases in which an EEOC administrative judge held a hearing and the complainant appealed the final agency decision to the EEOC: the average time from filing a complaint to the EEOC's final decision on appeal was

---

[339] Reprisal accounted for 11,608 (19.1%) of the 60,944 allegations of discrimination in 24,592 formal complaints during FY-94. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 at 20-21.

[340] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 at 44. These figures actually reflect an improvement from FY-93. Complaints pending acceptance or dismissal had been open an average of 313 days in FY-93; those pending investigation, 305 days; those pending a hearing, 484 days; and
those pending a final agency decision, 438 days. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1993 at 34.

[341] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 at 34.

over 800 days.[342] Agency decision making, plentiful opportunities for appeal, and long appellate processing times slow the process to a crawl while the inventory grows.[343]

*c. **Overlapping jurisdiction*** -- Part I described the roles of the MSPB, the negotiated grievance procedure, and the FLRA in adjudicating or reviewing discrimination complaints. The MSPB decides discrimination issues in mixed appeals.[344] Arbitrators decide discrimination issues in grievances.[345] The FLRA interprets discrimination laws when reviewing exceptions from arbitration decisions on non-mixed grievances,[346] and the MSPB does so in the case of mixed grievances.[347]

---

[342] *Hearings, supra* note 20 (statement of Timothy P. Bowling, U.S. General Accounting Office).

[343]

> From fiscal years 1991 to 1994, the number of discrimination complaints filed increased by 39 percent; the number of requests for a hearing before an EEOC administrative judge increased by about 86 percent; and the number of appeals to EEOC of agency final decisions increased by 42 percent. Meanwhile, the backlog of requests for EEOC hearings increased by 65 percent, and the inventory of appeals to EEOC of agency final decisions tripled.

Id.

[344] *See supra* part I.E.1-3.

[345] *See supra* part I.F.2, 4.

[346] *See supra* part I.F.2.

[347] *See supra* part I.F.4.

Bifurcation of CSC jurisdiction was necessary to eliminate the conflict of interest between that agency's management and adjudicatory responsibilities. Elimination of the CSC's conflict, however, did not require scattering adjudicatory responsibility among the EEOC, MSPB, FLRA, and NGP. Labyrinthine review procedures were the price of congressional efforts to balance the MSPB's merit protection role with the EEOC's "role of principal Federal agency in fair employment enforcement."[348]

2. Civil service cases -- The MSPB is one of the brighter lights of Federal employment litigation. It decided 13,160 cases

---

[348] Message of the President, *supra* note 20. *See, e.g.* S. REP. No. 969, 95th Cong., 2nd Sess. 52-53 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2774-75 (describing efforts to strike a careful balance between powers of the MSPB and the EEOC, to "protect against inconsistent decisions by the Board and Commission, to prevent forum shopping, and to make the procedures for consideration of the same matter by both agencies as streamlined as possible.").

Members of Personnel Management Project Task Force 4 were surprised by

> how far in the opposite direction from what [they] said that the law went, which was to simplify and make less complex the discrimination complaints system. There is a mixed case section that appears to be a nightmare. I am not sure that many cases come up. But it was one of the great surprises we received when the act came out.

U.S. GENERAL ACCOUNTING OFFICE, CIVIL SERVICE REFORM: DEVELOPMENT OF 1978 CIVIL SERVICE REFORM PROPOSALS 37 (1988) (remarks of Harriet Jenkins, Personnel Management Project Task Force on Equal Employment Opportunity and Affirmative Action) (transcript of a seminar held jointly by GAO and the Senate Governmental Affairs Subcommittee on Federal Services, Post Office, and Civil Service on March 31, 1988).

in Fiscal Year 1995, 90 percent of which were appeals of agency personnel actions.[349] Administrative judges issued initial decisions an average of 96 days after filing.[350] The Board also averaged 96 days to review initial decisions.[351] The U.S. Court of Appeals for the Federal Circuit left MSPB decisions untouched in 94 percent of the cases appealed, a much higher success rate than other administrative agencies enjoy in other circuit courts of appeal,[352] and the EEOC differed with the MSPB in only one of 140 mixed cases.[353]

The General Accounting Office recently evaluated the MSPB's performance, management, and operations, and reported the results to the Senate Committee on Government Affairs:

> The responses from practitioner groups reflect a general view that MSPB has been fair in processing employee appeals of agency personnel actions. MSPB's fairness in processing employee appeals was further indicated by the fact that over the 4-year period ending September 1994, 91 percent of the final MSPB decisions appealed to the U.S. Court of Appeals for the Federal Circuit were upheld; the remainder were either reversed or returned to MSPB for further action.[354]

---

[349] Hearings supra note 20 (statement of MSPB Chairman Benjamin Erdreich).

[350] *Id.*

[351] *Id.*

[352] PETER BROIDA, A GUIDE TO MERIT SYSTEMS PROTECTION BOARD LAW AND PRACTICE 2148 (1994).

[353] Hearings, supra note 20 (statement of MSPB Chairman Benjamin Erdreich).

[354] U.S. GENERAL ACCOUNTING OFFICE, MERIT SYSTEMS PROTECTION BOARD: MISSION PERFORMANCE, EMPLOYEE PROTECTIONS, AND WORKING ENVIRONMENT 3 (1995).

The MSPB does not, however, have jurisdiction (let alone exclusive jurisdiction) over every civil service case, notwithstanding its responsibility "for safeguarding the effective operation of merit principles in practice."[355] The Board does not review arbitration decisions on Chapters 43 and 75 grievances; those cases go directly to the Federal Circuit.[356] An agency must implement an unlawful arbitration decision that favors the grievant if the OPM is not interested in appealing or the court exercises its discretion to deny the OPM petition for review.[357] Ironically, the MSPB would have jurisdiction to review the same arbitration award if the underlying grievance alleged unlawful discrimination as an affirmative defense to the Chapter 43 or 75 action.[358] Rogue arbitration decisions can undermine the MSPB's merit protection efforts.

The MSPB also lacks jurisdiction to review arbitration decisions on grievances involving civil service actions that would be appealable to the MSPB but for the availability of the

---

[355] S. REP. No. 969, 95th Cong., 2nd Sess. 6 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2728.

[356] 5 U.S.C. § 7121(f) (1994). The respondent agency has no appeal rights, and the OPM can appeal only in substantial impact cases at the court's discretion. 5 U.S.C. § 7703(d) (1994); *see supra* part I.F.3.

[357] In *Horner v. Garza*, 832 F.2d 150 (Fed. Cir. 1987), the court denied the OPM's petition for review of an arbitration decision that mitigated a Chapter 43 action, contrary to MSPB and Federal Circuit precedent. *Cf.* Cornelius v. Nutt, 472 U.S. 648 (1985) (arbitrator required to follow MSPB precedent in employee discipline cases).

[358] 5 U.S.C. § 7121(d) (1994).

negotiated grievance procedure.[359] For example, a bargaining unit employee who is denied a within-grade pay increase must use the NGP if it does not exclude the dispute. The FLRA, not the MSPB, reviews any arbitration award,[360] and the FLRA decision generally is not subject to judicial review.[361] There is no mechanism for reconciling FLRA interpretations of civil service law with MSPB precedent, notwithstanding that "the focus of the FLRA's work is really federal workplace disputes and institutional relationships, as opposed to the appeals process for federal employees."[362]

The system for adjudicating civil service cases is in better shape than that for discrimination complaints, but limitations on MSPB jurisdiction present the opportunity for disparate results in like cases. This becomes especially apparent when one examines recent developments in the area of arbitrator power.

3. Arbitrator power -- Congress recently amended the CSRA to empower arbitrators to order an agency-party to discipline an

---

[359] 5 U.S.C. § 7121 (1994); *see supra* part I.F.1.

[360] 5 U.S.C. § 7122 (1994).

[361] Griffith v. FLRA, 842 F.2d 487 (D.C. Cir. 1988); *see supra* note 254 and accompanying text.

[362] *Hearings, supra* note 20 (statement FLRA Chair Phyllis Segal). In contrast, consider the elaborate scheme for coordinating MSPB and EEOC decisions in mixed cases. *See supra* part I.E.3.

employee whom the arbitrator finds has committed a prohibited personnel practice against the grievant.

> (A) The provisions of a negotiated grievance procedure providing for binding arbitration . . . shall, if or to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order--
>
> (ii) the taking, by an agency, of any disciplinary action identified under section 1215(a)(3) that is otherwise within the authority of such agency to take.
>
> (B) Any employee who is the subject of any disciplinary action ordered under subparagraph (A)(ii) may appeal such action to the same extent and in the same manner as if the agency had taken the disciplinary action absent arbitration.[363]

Suppose an arbitrator orders the agency to remove a non-probationary competitive service manager whom the arbitrator finds discriminated[364] against the grievant. Where does that leave the manager and the agency? The manager was not a party to the grievance, and may not have even appeared before the arbitrator. The arbitrator's power is either unconstitutional or illusory.

The agency must notify the manager of the proposed removal and afford the due process required by statute.[365] What next if the deciding official determines based on all the evidence,

---

[363] 5 U.S.C. § 7121(b)(2) (1994) (as amended by United States Office of Special Counsel, Merit Systems Protection Board: Authorization Act, Pub. L. No. 163-424, § 9, 108 Stat. 4361, 4365 (1994)). Of the disciplinary actions listed in 5 U.S.C section 1215(a)(3), an agency would otherwise have authority to impose a removal, a suspension, or a reprimand.

[364] Discrimination is a prohibited personnel practice. 5 U.S.C. § 2302(b)(1) (1994).

[365] *See supra* note 59 and accompanying text.

including that presented by the manager, that no discipline is appropriate? The statute is unconstitutional if the deciding official must impose discipline anyway. If the deciding official has discretion to not impose discipline, then the arbitrator really has no power to order it.

The manager has a property interest in that job.[366] Deprivation of such a property interest requires due process of law.[367] Due process includes the right to notice of the charges, an explanation of the employer's evidence, and an opportunity to respond *prior to* the deprivation, followed by a post-deprivation administrative hearing and judicial review.[368] The pre-deprivation opportunity to respond is designed to provide "an initial check against mistaken decisions -- essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."[369]

The agency violates the 5th amendment, therefore, if it removes the manager without a pre-deprivation opportunity to respond. The same constitutional violation arises if the agency gives the manager the opportunity to respond but disregards the

---

[366] Board of Regents v. Roth, 408 U.S. 564 (1972).

[367] *Id.*; U.S. CONST. amend. V.

[368] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); *see also* Mathews v. Eldridge, 424 U.S. 319 (1976) (defining the balancing test for determining what process is due).

[369] Loudermill, 470 U.S. at 533.

manager's evidence because the arbitrator's order requires discipline in any event; that kind of "due process" would be a sham. That the manager may appeal the removal "to the same extent and in the same manner as if the agency had taken the disciplinary action absent arbitration"[370] does not save the statute. Due process requires an opportunity to persuade the deciding official not to impose the deprivation in the first place.[371]

No administrative judge or administrative law judge has authority to order discipline of an employee who is not a party to the action from which the order issues. The MSPB has no such authority. The EEOC has no such authority. The FLRA has no such authority. No court has such authority. It is inconceivable that an arbitrator should have that authority.

III. Unscrambling Federal Merit Protection

Federal employment disputes currently march to the beat of too many different drummers. These cases all involve merit principles, yet no inherent logic ties together the array of procedures that can apply. This part describes proposals that mend current system defects by (1) expanding MSPB jurisdiction at the expense of the EEOC and the FLRA; (2) abandoning the CSC

---

[370] 5 U.S.C. § 7121(b)(2)(B) (1994).

[371] Loudermill, 470 U.S. at 542-45.

model of complaints processing in favor of the MSPB model; (3) integrating and focusing administrative review to ensure consistent interpretation of discrimination and civil service laws; and (4) aligning arbitrator powers with those of administrative judges in similar cases.

Employees will retain all current substantive rights; they will know how and where to proceed with their cases; and they will obtain faster decisions based on consistent interpretation of Federal law. These proposals do not tamper with collective bargaining rights, and they preserve the role of the negotiated grievance procedure in resolving bargaining unit employees' disputes. They will reduce the burden on agency personnel offices and may even save the taxpayers some money along the way. The changes discussed below are interrelated components of systemic reform.

A. Expanding MSPB Jurisdiction

The MSPB will absorb EEOC jurisdiction over discrimination complaints against Federal employers. The MSPB also will absorb FLRA jurisdiction to review arbitration decisions on grievances alleging discrimination,[372] grievances alleging other prohibited personnel practices, and civil service grievances for which the negotiated grievance procedure is the exclusive forum.[373] Finally, the MSPB will acquire jurisdiction to review arbitration

---

[372] *See supra* part I.F.2.

[373] *See supra* part I.F.1.

decisions on Chapters 43 and 75 grievances, on petitions for review from either party or the OPM.[374]

There is no compelling reason for the EEOC to adjudicate Federal employees' discrimination complaints, and no justification for the current diffusion of jurisdiction among the MSPB, EEOC, and FLRA. The description of the various processes in part I was painfully intricate; transferring EEOC and FLRA jurisdiction to the MSPB will foster simplicity, consistency, and fairness, and it will bring discrimination-free employment into the fold with the other merit principles.

Employee advocates might be skeptical. Is the MSPB an appropriate repository for such sweeping jurisdiction? Are collective bargaining rights at risk? Will the influx of new cases immediately overwhelm the MSPB? These are reasonable questions in light of experience with the last batch of reforms, but the answers are favorable.

*1. **Management bias?*** -- Is the MSPB an unfriendly forum for discrimination complainants? MSPB initial decisions in mixed cases include findings of discrimination about 2 percent of the time.[375] At first blush, this appears seriously out of step with the nearly 13 percent of EEOC hearing decisions that recommended

---

[374] *See supra* part I.F.3.

[375] *See* U.S. MERIT SYSTEMS PROTECTION BOARD, ANNUAL REPORT FOR FISCAL YEAR 1994 at 28 (2% of 359 initial decisions); U.S. MERIT SYSTEMS PROTECTION BOARD, ANNUAL REPORT FOR FISCAL YEAR 1993 at 48 (2% of 833 initial decisions); U.S. MERIT SYSTEMS PROTECTION BOARD, ANNUAL REPORT FOR FISCAL YEAR 1992 at 55 (3% of 314 initial decisions).

a finding of discrimination in fiscal year 1994.[376] Closer examination, however, reveals that the MSPB does not differ significantly from the EEOC in its interpretation and application of discrimination laws.

An MSPB administrative judge conducts the hearing in a mixed case, but the complainant may petition the EEOC for review of the final MSPB decision.[377] Where the EEOC grants review, it examines the MSPB decision for whether "as a matter of law -- (i) the decision of the Board constitutes an incorrect interpretation of any provision of any [discrimination] law, rule, regulation, or policy directive . . . or (ii) the decision involving such provision is not supported by the evidence in the record as a whole."[378] If the MSPB lacked sufficient expertise in the field of employment discrimination law, or if it were biased in applying that law to the facts in mixed cases, one would expect a substantial number of cases in which the EEOC "issue[d] in writing another decision which differ[ed] from the decision of the Board."[379] In the last 5 years, however, the EEOC has

---

[376] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 at 48.

[377] 5 U.S.C. § 7702(b) (1994).

[378] 5 U.S.C. § 7702(b)(3) (1994).

[379] 5 U.S.C. § 7701(b)(3) (1994).

disagreed with the MSPB in only 9 (1.2%) of 732 mixed cases presented on petition.[380]

A more likely explanation for the statistical differences between the decisions of MSPB and EEOC administrative judges is the unique nature of a mixed case. Once a discrimination complainant presents a *prima facie* case, the respondent agency can defeat the presumption of discrimination by articulating a legitimate non-discriminatory reason for the action.[381] The complainant then must prove by preponderant evidence that the articulated reason for the action was merely pretext for discrimination.[382] A mixed case, by its very nature, incorporates a legitimate nondiscriminatory reason for the personnel action taken. The due process prerequisites to a Chapter 43 or 75 action force the agency to articulate and support the basis for the personnel action.[383] Even if the administrative judge finds that the agency lacked the necessary basis for the personnel action, the record often will support agency claims of honest mistake rather than intentional discrimination. Absent a smoking gun, the mixed case appellant is pushing uphill.

---

[380] *Hearings, supra* note 20 (statement of MSPB Chairman Benjamin Erdreich).

[381] McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

[382] The complainant must prove both that the articulated reason was false, and that discrimination was the real reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

[383] *See supra* notes 59, 66 and accompanying text.

The availability of a civil trial *de novo* provides an escape valve. Complainants will migrate to U.S. district court at the earliest opportunity if the MSPB proves hostile to their claims. A mass exodus from the administrative process is unlikely, however. The General Accounting Office found that unions and private attorneys who represent Federal employees generally are confident in the fairness of the MSPB.[384]

2. Delay on the horizon? -- MSPB regional offices received 9,965 initial appeals during fiscal year 1995;[385] during the same period, aggrieved individuals filed 24,592 EEO complaints with respondent agencies.[386] Might not this combined docket, along with broader jurisdiction to review grievance arbitration decisions, overwhelm the MSPB? Fortunately, proposed procedural reform will liberate sufficient resources to fund a robust MSPB fit for the task.

---

[384] U.S. GENERAL ACCOUNTING OFFICE, MERIT SYSTEMS PROTECTION BOARD -- MISSION PERFORMANCE, EMPLOYEE PROTECTIONS, AND WORKING ENVIRONMENT 3 (1995). Sixty-three percent of private attorneys, and 59 percent of union officials surveyed believed that the MSPB regional offices (administrative judges) are almost always or generally fair; 17 percent and 15 percent respectively believed that the regional offices were fair about as often as not. *Id.* at 7. Forty-six percent and 81 percent respectively believed that the MSPB headquarters was almost always or generally fair; 25 percent and 6 percent believed that it was fair as often as not. *Id.* at 8.

[385] U.S. MERIT SYSTEMS PROTECTION BOARD, ANNUAL REPORT FOR FISCAL YEAR 1994 at 24.

[386] *Hearings, supra* note 20 (statement of EEOC Chairman Gilbert F. Casellas).

The EEOC had 77 administrative judges in its district offices at the end of fiscal year 1994.[387] Those judges will transfer to MSPB regional and field offices. Based on an average production of 120 cases per EEOC administrative judge per year,[388] and 25,000 new cases per year, the MSPB may need as many as 130 additional judges to keep up with the case load under the procedures proposed below.[389]

The EEOC had 39 appellate counsel at the end of FY-94.[390] Those counsel, who analyze cases on appeal and draft proposed EEOC decisions, will transfer to the MSPB to perform similar duties in the MSPB Office of Appeals Counsel.[391] Assuming 7500 appeals of discrimination cases annually, and an annual production of 140 appeals per attorney, the MSPB may need as many

---

[387] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 at 50.

[388] The average number of resolutions per administrative judge was 124.3 in FY-94, 126.1 in FY-93, 113.5 in FY-92, and 94.6 in FY-91. *Id.*

[389] This is a very conservative estimate. The actual need for administrative judges should be lower, because many of these complaints will be resolved shortly after filing (and therefore require less of the assigned administrative judge's time). For example, the EEOC reported 21,565 cases closed by various means in FY-94; of those, 28 percent were dismissed. *Id.* at 33. Assuming that the dismissal rate held steady, only 18,000 of the 25,000 new formal complaints would be accepted. Rather than 130 new administrative judges, therefor, the figure would be closer to 74.

[390] *Id.* at 65.

[391] *See* U.S. MERIT SYSTEMS PROTECTION BOARD, ANNUAL REPORT FOR FISCAL YEAR 1994 at 17.

as 15 additional appellate attorneys to remain current with the case load.[392]

The MSPB also will need additional support staff at both the headquarters and regional levels, although economies of scale and automation should avoid the need for a proportionate increase. Where will the MSPB find the resources for fifteen appellate attorneys, 130 administrative judges, and an undetermined number of support staff? Federal agencies reported spending over $33.6 million to investigate discrimination complaints in fiscal year 1994.[393] The procedural reforms, discussed below, eliminate the agency investigation from the complaints process,[394] and create the opportunity to reprogram sufficient resources to hire the necessary personnel.[395]

*3. **Inferior employment rights and remedies?*** -- President Carter issued Reorganization Plan No. 1 to "ensure that: (1) Federal employees have the *same rights and remedies* as those in

---

[392] The EEOC received 7,141 appeals in FY-94; appellate attorneys handled an average of 146 appeals each. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 at 61, 65.

[393] *Id.* at T-21.

[394] *See infra* part III.B.1-3.

[395] Inter-agency turf wars pose a traditional barrier to transferring money and positions within the executive branch, but that does not change the fact that the resources will be available on the macro level. Turf wars can be circumvented through executive order or statutory directive. Agencies will need to retain some of the liberated resources, however, because procedural reforms pushing cases to litigation earlier would likely generate a need for additional litigation staff.

the private sector and in State and local government; [and] (2) Federal agencies meet the *same standards* as are required of other employers."[396] EEOC jurisdiction over complaint adjudication is not an essential element to achieving either objective.

It is misleading to state that Federal employees have, or should have, the *same* rights and remedies as private sector employees. The EEOC does not adjudicate complaints against non-Federal respondents; it investigates, attempts to conciliate, and then either sues in U.S. district court on behalf of the complainant or issues the complainant a "right to sue" letter authorizing the complainant to proceed alone.[397] The EEOC does not represent Federal-sector complainants in U.S. district court;[398] private sector complainants, however, do not enjoy the opportunity for two hearings -- an administrative adjudication followed by a civil trial. Litigation rights and remedies have never really been the *same*.

This dichotomy betrays the fallacy of protests that transferring EEOC jurisdiction to the MSPB will lead to separate

---

[396] *Message of the President, supra* note 17 (emphasis added).

[397] 42 U.S.C. § 2000e-5 (Supp. V 1993).

[398] The unitary executive theory would prevent the EEOC from representing a complainant in an Article III court against another Federal agency. Federal agencies, including independent agencies such as the EEOC, are part of the executive branch. Since "[t]he executive Power [is] vested in a President of the United States of America," these agencies are agents of the President. U.S. CONST. art. III, § 1, cl. 1. The President cannot be both the plaintiff and the defendant in the same lawsuit.

sets of substantive rights. The EEOC currently has no power to align the common law of private-sector employment discrimination with the administrative common law of Federal employment discrimination, because the EEOC is a party to private-sector cases[399] and the adjudicator of Federal-sector cases. Private-sector cases are litigated in U.S. district court. Federal-sector complainants have access to the same forum upon exhausting administrative remedies. Article III courts presently are, and will remain, the only common forum for both classes of complainants. The Supreme Court and the U.S. Circuit Courts of

---

[399] Prior to 1972 the EEOC could investigate private-sector charges and attempt conciliation, but could not sue on behalf of the complainant. The Equal Employment Opportunity Act of 1972 gave the EEOC prosecutorial power, but denied it any power to issue cease-and-desist orders. "[C]ongressional Republicans were concerned with conferring fact-finding responsibilities on the EEOC. The agency had 'attained an image as an advocate for civil rights,' and thus there was opposition to increasing the EEOC's enforcement authority centered on the fear that an over-zealous agency would be acting as investigator, prosecutor, and judge. Moreover, Title VII claims were perceived as calling for little policy balancing and
much fact-finding, at which judges were believed more adept." Rebecca Hanner White, *The EEOC, The Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 62-66 (citations omitted).

One could argue that the EEOC currently has an institutional conflict of interest, because it is the investigator and prosecutor for the claims of one set of employees (private-sector), and the judge for the claims of another set of employees (Federal-sector). The Personnel Management Project leadership "believe[d] that assigning policy, assistance, and adjudicatory functions concerning equal employment opportunity to the Equal Employment Opportunity Commission [would] set up within that agency the same kind of role conflict for which the Civil Service Commission has been criticized." 1 PERSONNEL MANAGEMENT PROJECT, FINAL STAFF REPORT 238 (Dec. 1977).

Appeals will continue to shape the direction of employment discrimination law.[400]

President Carter's second stated objective, that "Federal agencies meet the *same standards* as are required of other employers,"[401] refers to the EEOC's responsibility for developing, where feasible "uniform standards, guidelines, and policies defining the nature of employment discrimination on the ground of race, color, religion, sex, national origin, age or handicap under all Federal statutes, Executive orders, regulations, and policies which require equal employment opportunity."[402] The proposed transfer of complaints jurisdiction leaves the EEOC with these responsibilities, as well as the responsibility for reviewing, approving, and monitoring Federal agencies'

---

[400] The Supreme Court has given limited deference to EEOC interpretations of Title VII, because Congress has not delegated to that agency authority to issue substantive legislative rules. *See* EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991); General Electric Co. v. Gilbert, 429 U.S. 125 (1976). This limited deference frustrates EEOC efforts to align private-sector common law with its own Federal-sector administrative precedent. To the extent that EEOC interpretations merit deference, however, Federal courts would apply those interpretations, where appropriate, to Federal-sector cases litigated in the district courts. This provides a means to reel in the MSPB should it stray too far with the proposed jurisdiction over pure discrimination complaints. For a discussion of deference accorded to EEOC interpretive guidelines, see Rebecca Hanner White, *supra* note 399.

[401] Message of the President, *supra* note 17 (emphasis added).

[402] Exec. Order No. 12,067, § 1-301, 43 Fed. Reg. 28,967 (1978), *reprinted as amended in* 42 U.S.C. § 2000e (1988). This executive order was one of several implementing Reorganization Plan Number 1. *But see supra* note 400 (limited judicial deference to EEOC interpretive guidelines).

Affirmative Employment plans and programs.[403] Moreover, the proposal invests the EEOC with authority to seek MSPB reconsideration of discrimination cases that the EEOC believes reflect a significant misinterpretation of a Federal discrimination law or policy.[404]

Transferring EEOC Federal-sector complaints jurisdiction to the MSPB will not lead to a divergence between Federal-sector and private-sector employee rights and remedies, and changing the fact-finder will not erode the substantive rights at issue. Civil servants will not fall to a disfavored status in equal employment opportunity law. They will enjoy relief from much of the confusion, delay, and inconsistency inherent in the current system.

*4. **Employees from other merit systems*** -- The EEOC complaints process currently is available to a much broader range of employees than is the MSPB appeals process. Nonappropriated fund employees and employees of Government corporations, for example, may invoke the Federal-sector discrimination complaints

---

[403] Affirmative Employment is a program for creating a Federal work force reflective of the U.S. population. The EEOC provides agencies with guidance on their affirmative employment programs; reviews and approves those agencies' affirmative employment plans; and monitors the implementation of affirmative employment policies and programs. 42 U.S.C. § 20003-16(b) (1988); U.S. GENERAL ACCOUNTING OFFICE, EEOC: FEDERAL AFFIRMATIVE PLANNING RESPONSIBILITIES 1-2 (1993).

[404] *See infra* part III.B.1, 3, 4.

process, but have no MSPB appeal rights.[405] Would the proposed expansion of MSPB jurisdiction push the Board beyond its competence? The answer is no.

There is nothing inherently incompatible with a single body having more limited jurisdiction for one class of cases than another. Even within the MSPB's current jurisdiction, prerequisites to appeal rights vary with the type of dispute.[406] Congress has recognized the MSPB's competence to look beyond the CSRA by assigning it responsibility to "conduct . . . special studies relating to . . . other merit systems in the executive branch, and report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected[.]"[407] It is, after all, the Merit Systems Protection Board.

B. Abandoning the CSC Model; Integrating Review

The proposals that follow are designed to inject logic, consistency, and (where possible) simplicity into the administrative process. Time-tested MSPB procedures provide a nucleus around which to assemble the procedures for handling discrimination complaints, mixed cases, and grievances. Individuals who believe they have been wronged will look to the

---

[405] *See supra* part I.B.1.

[406] *Id.*

[407] 5 U.S.C. § 1205(a)(3) (1994).

MSPB for redress unless they are covered by a collective bargaining agreement, in which case they may elect or be required to use the negotiated grievance procedure. The MSPB will perform any administrative review regardless of whether a hearing decision originates with an arbitrator or an administrative judge. Transforming the complaints process from the CSC model to the MSPB model will eliminate agency conflicts of interest. Elimination of unnecessary procedures will save money and reduce delay. Re-routing of administrative review will simplify the process, enhance consistency, and reduce forum shopping. None of these changes will erode substantive employee rights or place employees at a procedural disadvantage.

*1. **Individual discrimination complaints** --* This subsection departs from the EEOC's current CSC model of agency processing in favor of the MSPB model of impartial adjudication. The agency will no longer be a party, investigator, and decision-maker in the same case.[408] The elimination of unnecessary

---

[408] The committee report on S. 2801, the Federal Employees Fairness Act of 1992, discussed the conflict of interest at length.

> A [1987] study of EEO officials on the effect of the agency adjudicating the claim against itself was conducted by the Washington Council of Lawyers, a non-partisan, voluntary bar association. . . . The survey of 350 EEO officers in 4 Agencies found an overwhelming majority of the officers believed that the conflict inherent in the process impaired its function. EEO counselors indicated that they often felt little clout to deal with the issue when the alleged discriminator held a higher position in the

administrative steps will accelerate the process and save resources. A faster process will mean a briefer period during which workplace relations are strained, perhaps reducing allegations of reprisal for engaging in the complaints process.[409] It also should foster more accurate hearing decisions because the availability of witnesses and evidence will improve.

The faster process need not mean less protection for complainants. Counselors will continue to conciliate disputes; discovery will substitute for the agency investigation; and the specter of an imminent hearing will sharpen the focus of issues for both sides and encourage settlement where appropriate.

a. Counseling and conciliation --

The MSPB will assign equal employment opportunity counselors to locations readily accessible by Federal employees. Counselors

---

agency. In situations where the counselor concluded that discrimination had occurred, they reported greatly increased scrutiny of the decision creating a built-in incentive to find no discrimination. EEO officers reported that witnesses against the agency often feel intimidated by supervisors. In some situations, the alleged discriminating official, who often views settlement as a concession of wrongdoing and opposes it for that reason, must approve the offer. At one agency, the general counsel has exclusive authority to accept or reject a complaint. That same general counsel also defends against the complainant at the hearing illustrating the dual role of the agency to defend against and to adjudicate discrimination complaints.

S. REP. No. 484, 102nd Cong., 2nd Sess. 7-8 (1992).

[409] *See supra* note 339.

will have 30 days to investigate the allegations, meet with the parties, and facilitate party attempts to resolve matters informally. The parties may agree to extend the counseling period for another 60 days to pursue mediation or other alternatives to litigation.

Counselors who are MSPB employees will enjoy greater independence and credibility than agency counselors. The MSPB can ensure that counselor training and education in discrimination law, investigation, and conciliation is more uniform and more thorough. The job will no longer be a mere collateral duty of, for example, a government contracts specialist.[410] These measures will enhance the professional stature of counselors, and should help slow or even reverse the decline in the proportion of cases resolved during the counseling process.[411]

Locating MSPB EEO counselors at or near the sites where agency counselors currently work will present logistical challenges, but the advantages of co-location outweigh the disadvantages. The counselor must be readily accessible to employees and must be sufficiently familiar with the agency to know where to look, whom to talk to, and how best to resolve disputes within the particular organization. The General

---

[410] More than 89 percent of agency EEO counselors in fiscal year 1994 performed the mission as a collateral duty. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 AT 17.

[411] See *supra* note 164 and accompanying text.

Accounting Office collected counseling cost data from 13 civilian cabinet departments and 16 Department of Defense agencies for fiscal year 1991; these agencies reported spending over $40 million on counseling.[412] Counseling is a huge task, but the efficiencies of a focused, professional corps of counselors may generate a net cost savings.

Alternative dispute resolution (ADR) increasingly is in vogue as a partial solution to crowded dockets.[413] The administrative process itself is an alternative to court litigation, but ADR techniques like mediation can prove useful when the parties must continue to work together following the ultimate resolution of the dispute. This proposal preserves the available 60-day extension of the counseling period to allow for mutually agreed-upon pursuit of ADR.[414]

---

[412] U.S. GENERAL ACCOUNTING OFFICE, FEDERAL WORKFORCE, AGENCIES' ESTIMATED COSTS FOR COUNSELING AND PROCESSING DISCRIMINATION COMPLAINTS 13-14 (1992).

[413]. For a sampling of current literature on the use of ADR in employment law, see PETER M. PANKEN, AMERICAN LAW INSTITUTE - AMERICAN BAR ASSOCIATION CONTINUING LEGAL EDUCATION, AVOIDING EMPLOYMENT LITIGATION: ALTERNATIVE DISPUTE RESOLUTION OF EMPLOYMENT DISPUTES IN THE 90'S (1995); Stephen J. Lacher, *Alternative Dispute Resolution (ADR) in the `90s and Beyond -- A View from the Neutral's Seat*, 67 N.Y. ST. B.J. 45 (Oct. 1995); ROBERT B. FITZPATRICK, AMERICAN LAW INSTITUTE - AMERICAN BAR ASSOCIATION CONTINUING LEGAL EDUCATION, ALTERNATIVE DISPUTE RESOLUTION - TYPES OF ADR MECHANISMS (1995); Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1 (1995); Joshua D. Rosenberg, H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487 (1994); Michael W. Hawkins, *Alternative Dispute Resolution: An Alternative for Resolving Employment Litigation and Disputes*, 20 N. Ky. L. Rev. 493 (1993).

[414] *See* 29 C.F.R. § 1614(d), (f) (1995). The MSPB has initiated an ADR program to facilitate settlement of appeals

b. The complaint --

The complainant will have 15 days from the end of the counseling period to file a complaint with the MSPB regional or field office and serve a copy on the respondent agency. The MSPB regional or field office will assign the case to an administrative judge who will determine whether to accept or dismiss the complaint. The administrative judge may dismiss the complaint sua sponte ***or on the respondent's motion. The complainant and the respondent will receive notice of the administrative judge's intent to dismiss*** sua sponte ***and will have 15 days to file briefs in support or opposition. The respondent will serve the complainant with a copy of any motion to dismiss and the complainant will have 15 days to file a brief in opposition. The complainant may appeal a dismissal to the MSPB within 35 days of the administrative judge's decision; the respondent will have no right to appeal prior to the administrative judge's issuance of an initial decision on the merits.***

EEOC regulations currently require complainants to file their complaints with the respondent agency,[415] which then

---

pending review before the full Board, as well as a pilot settlement judge program at its regional and field offices. The regional and field offices assign an administrative judge to the appeal, "but a separate settlement judge works with the parties to try to settle the case. If settlements are not successful, the appeal is adjudicated by the judge assigned to the case." U.S. MERIT SYSTEMS PROTECTION BOARD, ANNUAL REPORT FOR FISCAL YEAR 1994 at 12-13.

[415] 29 C.F.R. § 1614.106 (1995).

determines whether to accept or dismiss the complaint on grounds other than the merits.[416] The complainant may appeal a dismissal to the EEOC.[417] Appeals generate delay. This proposal should reduce the number of improper dismissals, because administrative judges can evaluate complaints more impartially, if not more accurately, than agencies accused of discrimination.

Agencies currently have no authority to dismiss complaints for lack of substance; an agency must investigate even patently non-meritorious cases, afford the complainant the opportunity for a hearing, and issue a final agency decision. The proposed procedures provide early access to an administrative judge who can adjudicate a motion to dismiss frivolous complaints.

When an administrative judge dismisses a complaint[418] on either procedural grounds or because it is frivolous, the complainant should have greater confidence in the fairness and accuracy of that decision than had the agency made it. Greater employee confidence and enhanced accuracy of decisions should combine to reduce appeals. Fewer appeals and earlier dismissal of frivolous cases should mean a faster administrative process.

---

[416] 29 C.F.R. § 1614.107 (1995).

[417] 29 C.F.R. § 1614.401 (1995).

[418] The proposal preserves current grounds for dismissal: the complaint fails to state a claim upon which relief can be granted; the complaint states a claim already pending before the MSPB, or that has already been decided by the MSPB; the complainant failed to meet the deadlines described above (counselor contact within 45 days, formal complaint within 15 days of end of counseling period); or the claim is moot or not yet ripe. *See* 29 C.F.R. § 1614.107 (1995).

c. The agency investigation --

The agency will not conduct formal investigations of complaints.

Agencies spent over $33 million investigating discrimination complaints in fiscal year 1994.[419] Less than 64 percent of the investigations completed that year were completed within 180 days, and 16 percent were open more than 9 months.[420] These investigations are not worth time and resources of that magnitude.

The most obvious problem with the agency investigation is the agency's inherent conflict of interest. The agency is accused of discrimination, yet it is supposed to assign or hire someone to "develop a complete and impartial factual record."[421] Just how complete and impartial is that factual record? Consider the findings of the Senate Committee on Governmental Affairs:

> The Committee found that the agency's ability to control the information upon which a decision is based, allows the agency to control the outcome of the decision. Complainants essentially can only take information for their case from an investigation developed by the agency.

---

[419] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 at T-21. This figure reflects the costs of investigations by agency personnel and those performed by contractors. The former conducted 10,612 investigations in FY-94; the latter performed 3,785. *Id.*

[420] *Id.* at T-24.

[421] 29 C.F.R. § 1614.108(b) (1995). Private contractors performed more than a quarter of agency investigations in fiscal year 1994. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 at T-21.

> The Governmental Affairs Committee confirmed in its investigation that where agencies are concerned, there was usually a lack of consistency and quality in investigations. Two-thirds of investigators surveyed said they would not routinely obtain the SF 171, a personnel form, frequently critical to the defense that a person was not qualified. Almost half of the investigators did not usually ask the complainant and the alleged discriminator to respond to each other's statements. This allows little opportunity to resolve inconsistencies. A significant number of EEO officials who relied on the investigations found them insufficiently probing. Additionally, investigators feel that, as a result of their lack of authority, they find it difficult to arrange meetings with witnesses and discriminating employees.[422]

An investigation ostensibly serves several purposes. It creates an administrative record for the agency head to evaluate to make the final agency decision on the complaint. The final agency decision, however, is infected by the conflict of interest inherent in the agency's dual status as respondent and decision maker. Elimination of the final agency decision erases that justification for an investigation.[423] The investigation also is a source of information for the parties to evaluate when assessing the merits of their respective cases; the congressional findings above, however, cast doubt upon the investigation's utility in this regard.

One would expect a fairly high rate of withdrawal or settlement upon completion of the report if the parties had confidence in the agency investigation. Agencies completed

---

[422] S. REP. No. 484, 102nd Cong., 2nd Sess. 9 (1992).

[423] *See infra* part I.B.1.

14,388 investigations in fiscal year 1994.[424] During the same period, complainants withdrew 897 complaints before the hearing stage, and the parties settled 2,836 before the hearing stage.[425] Assuming that completed investigations inspired all these closures,[426] the disposition rate would be a little over 25 percent. On the other hand, 52 percent of settlements and 54 percent of withdrawals in fiscal year 1994 occurred after an administrative judge became involved with the case and the parties had an opportunity for discovery.[427]

The proposal gives the parties earlier access to discovery;[428] and discovery, combined with the prospect of a timely hearing, sharpens the focus of issues and inspires the parties to evaluate their respective cases more realistically. EEOC procedures take too long to reach that stage. One way to reduce the delay is to eliminate the investigation.

d. Discovery -- This subsection outlines the MSPB discovery process[429] as adapted to discrimination complaints.

---

[424] *Id.*

[425] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 at 33, 47.

[426] In actuality, many settlements and withdrawals occur prior to completion of the investigation.

[427] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 at 33, 47.

[428] *See infra* part III.B.1.d.

[429] *See* 5 C.F.R. §§ 1201.71 - 1201.74 (1995).

The administrative judge will notify the parties of their right to initiate discovery methods permitted by the Federal Rules of Civil Procedure.[430] The parties will have 25 days from notification to serve each other with initial discovery requests or motions. Discovery responses will be due within 20 days. A party may serve a supplemental request within 10 days of receiving the prior response, unless the administrative judge directs otherwise.

Parties may request that the administrative judge issue a subpoena for documents or things. The administrative judge will rule on motions to quash. A party may file a motion to compel

---

430

> *Methods to Discover Additional Matter.* Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written question; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

FED. R. CIV. P. 26(a)(5).

> *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

FED. R. CIV. P. 16(b)(1).

discovery within 10 days of the unmet deadline for a request or within 10 days of receiving objections to the request. The administrative judge has discretion to order or limit discovery, and will establish the date by which the parties shall complete discovery. Discovery issues are not subject to further review.

EEOC Management Directive MD-110,[431] combined with the regulations at part 1614 of the Code of Federal Regulations, provides a comprehensive discovery process with a fairly optimistic schedule. Those procedures are not necessarily inferior to those of the MSPB; however, using uniform discovery procedures will further the interests of consistency, simplicity, efficiency, and timeliness. Experience with mixed MSPB appeals, which by definition include discrimination issues, has demonstrated the suitability of MSPB discovery procedures for discrimination cases.[432]

e. Summary judgment --

Either party may move for summary judgment upon completion of discovery. The opposing party has 15 days to file an

---

[431] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EQUAL EMPLOYMENT OPPORTUNITY MANAGEMENT DIRECTIVE FOR 29 C.F.R. - PART 1614, EEO MD-110 ch. 6 at 9-16.

[432] MSPB discovery rulings are subject to judicial scrutiny by the Federal Circuit on appeal from the final decision. The standard of review is abuse of discretion. Curtin v. Office of Personnel Management, 846 F.2d 1373, 1379 (Fed. Cir. 1988); Spezzaferro v. Federal Aviation Admin., 807 F.2d 169, 173 (Fed. Cir. 1986). The *de novo* nature of "judicial review" of EEOC decisions, on the other hand, forecloses any judicial check on EEOC administrative judges' discovery rulings because the case begins anew in Federal court.

opposition brief. An award of summary judgment will constitute an initial decision.

Summary judgment can play an important role in the resolution of discrimination complaints. The parties will develop their cases during the discovery process. Either party may move for summary judgment if discovery reveals no genuine and material issues of fact. Denial of the motion will not be reviewable; the parties will litigate the case at a hearing. The parties may petition for review of a partial award of summary judgment, but the Board may choose to postpone that review pending the administrative judge's decision on the remainder of the case.

Current EEOC regulations provide for an administrative judge's decision analogous to summary judgment, but the case does not reach that stage until after the investigation, and the decision is merely a recommendation to the agency.[433] Summary judgment should dispose of complaints that might have been withdrawn following completion of an agency investigation. The administrative judge's early involvement with the case will facilitate expeditious disposition.

f. The hearing --

---

[433] *See* 29 C.F.R. § 1614.109(e) (1995).

The administrative judge will conduct a hearing according to procedures generally applicable to MSPB appeals.[434]

Current EEOC hearing procedures are not substantially different from MSPB hearing procedures. The rules of evidence do not apply strictly; witnesses testify under oath; and the administrative judge has discretion to limit cumulative witnesses and evidence, power to exclude persons for contumacious behavior and discretion to draw adverse inferences from the failure to produce required evidence.[435] The major procedural difference is that the MSPB holds open hearings, and EEOC hearings are closed because they are part of the investigative process.[436] The hearing will no longer be part of the investigative process, and MSPB administrative judges will have discretion to close discrimination complaint hearings where appropriate.[437] Applying uniform procedures to civil service and discrimination cases will simplify the overall system.

g. The initial decision --

---

[434] *See* 5 C.F.R. §§ 1201.51 - 1201.64 (1995). Section 1201.56, however, prescribes burdens of proof and affirmative defenses that are tailored for MSPB appeals, and inappropriate for pure discrimination cases. This regulation would yield to applicable statutory law and case precedent. *See supra* note 179 and accompanying text.

[435] *See* 29 C.F.R. § 1614.109 (1995); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, OFFICE OF FEDERAL OPERATIONS, ADMINISTRATIVE JUDGE'S HANDBOOK, EEOC ORDER 960.003 §§ 300-600 (July 1, 1991).

[436] 5 C.F.R. § 1201.52 (1995); 29 C.F.R. 1614.109(c) (1995).

[437] 5 C.F.R. § 1201.52 (1995).

The administrative judge will issue an initial decision within 180 days of the date that the complainant filed the complaint, such period to be extended by any time elapsed in the appellate process. The administrative judge may extend the period by 60 days to allow the parties to complete discovery in exceptionally complex cases.

The administrative judge's decision will not be a recommendation to the agency; it will be an initial decision that becomes the MSPB's final decision absent a timely petition for review. This change avoids the agency's current conflict of interest. The agency is a party; it should not also be a decision maker.

EEOC regulations give the respondent agency head 60 days to adopt the recommended decision or to issue a contrary decision. The complainant may appeal that decision to the EEOC. Eliminating this step will cut 60 days from the administrative process and eliminate the need for agencies to maintain staffs that review the recommended decisions and draft final agency decisions.

The 180-day deadline for initial decisions recognizes that necessary discovery can be more extensive in discrimination cases than in civil service cases. Extensions beyond 180 days, however, will be reserved for truly unusual cases.

h. Remedies --

The initial decision will include findings on the amount of any compensatory damages if the MSPB administrative judge finds discrimination.

EEOC administrative judges who find discrimination currently do not specify the amount of compensatory damages in the recommended decision.[438] The agency head determines a damage award somewhere between zero and $300,000. The complainant who prevails at the hearing is unlikely to accept the discriminating agency's calculation at face value; an appeal to the EEOC is a practical certainty. MSPB administrative judges in mixed cases, on the other hand, determine the amount of compensatory damages in their initial decisions.[439] Their doing so in discrimination cases should reduce appeals, because an administrative judge does not have the agency's incentive to "low-ball" the complainant, and the complainant is more likely to have confidence in the impartiality of the administrative judge's decision.

i. Administrative review --

The parties will have 35 days to petition the MSPB for review of the initial decision. The MSPB will review the initial decision de novo, with deference to credibility findings based on

---

[438] Memorandum from James H. Troy, Director, Office of Program Operations, EEOC, to District Directors and Administrative Judges (October 6, 1993).

[439] *See* Hocker v. Department of Transportation, 63 M.S.P.R. 497, 505 (1994).

demeanor. The initial decision becomes the MSPB final decision if neither party files a timely petition for review.

The procedures for obtaining review of initial decisions on a discrimination complaint will generally follow those applicable to MSPB appeals. This uniformity fosters simplicity and consistency.

j. EEOC petition for reconsideration --

The EEOC may petition the MSPB for reconsideration of a final decision that the EEOC believes reflects an erroneous interpretation of Federal discrimination law or policy. The EEOC petition is timely if filed within 35 days of the MSPB final decision. The MSPB will dismiss a pending EEOC petition for reconsideration if the complainant files a civil action for a trial de novo in U.S. district court. The MSPB decision on reconsideration is not subject to judicial review, but the complainant retains the right to file a civil action for a trial de novo in U.S. district court.

The EEOC can provide the MSPB with the benefit of its expertise by petitioning for reconsideration of final decisions. This will be an opportunity for the MSPB to reconcile its case law with the positions that the EEOC advocates on behalf of private-sector employees. The EEOC's views will not bind the MSPB, but its involvement in a case will highlight any problems that may warrant congressional oversight.

k. Judicial review --

The MSPB final decision will bind the respondent agency. The complainant may file a civil action for a trial de novo in U.S. district court at any of the following stages of the administrative process: within 90 days of a final decision dismissing all or part of a complaint; within 90 days of the MSPB's final decision on the merits; at any time after 180 days from filing the complaint, in the absence of a final decision, if no appeal is pending; or at any time after 180 days from appealing to the MSPB, if the MSPB has not yet issued a decision. A complainant alleging age discrimination may file a civil action any time within 180 days of the alleged discriminatory event, after providing the MSPB 30 days' notice of intent to sue.

The pendency of an EEOC petition for reconsideration of a final MSPB decision shall not extend the complainant's 90-day deadline for filing a civil action.

Complainants will enjoy the same opportunities for judicial review from MSPB decisions that they enjoy from agency and EEOC decisions. The final administrative decision will continue to bind agencies. The U.S. district courts and the circuit courts of appeal will develop and reconcile the common law of Federal-sector employment discrimination with that of the private sector, ensuring that Federal complainants are not relegated to second-class status.

The ability to abandon the administrative process 180 days after filing the complaint should not undermine the MSPB process.

If the administrative case is progressing on schedule, the complainant has an incentive to secure a final decision before resorting to the courts. Age discrimination cases will remain an exception to exhaustion requirements.[440] Perhaps they should be fully integrated with Title VII and Rehabilitation rights and remedies, but that is a policy question for another day.

2. Class discrimination complaints -- Class complaint procedures will generally follow those for individual complaints, with modifications as discussed below. These procedures continue to limit the agency to the role of a party, ameliorating the conflicts of interest that currently prolong the administrative process. The administrative judge, not the respondent agency, will decide whether to certify the class;[441] whether settlements are fair and adequate for the class as a whole;[442] whether the agency committed unlawful discrimination; and the type and amount of any class-wide or individual relief. The proposals that

---

[440] *See* 42 U.S.C. § 633a (1988).

[441] Under EEOC regulations, an administrative judge recommends whether to certify the class, and the agency has 30 days to accept or reject that recommendation. 29 C.F.R. § 1614.204(d) (1995).

[442] Under current EEOC regulations, the administrative judge reviews class member objections to a proposed settlement, and makes a recommendation as to whether the settlement is fair and reasonable. The agency then makes the final decision, which is appealable to the EEOC Office of Federal Operations. 29 C.F.R. § 1614.204(g)(4) (1995).

follow build upon the individual complaint procedures just described.[443]

a. Acceptance or dismissal of the complaint --

The administrative judge will determine, following notice to the parties and their opportunity to submit briefs, whether the putative class meets the requirements of numerosity, commonality, typicality, and adequacy of representation.[444] The class representative may appeal to the MSPB or proceed with an individual complaint if the administrative judge refuses to certify the class.

The administrative judge is free of the agency's conflict of interest. Enhanced credibility of decision making should bolster complainant confidence in system fairness, reduce the number of appeals, and expedite the administrative process.

b. Notice to the class --

The administrative judge, upon certifying a class, will order the respondent agency to notify class members of this certification.

This proposal follows current EEOC procedures.[445]

---

[443] *See supra* part III.B.1.

[444] *See supra* note 203 and accompanying text.

[445] *See* 29 C.F.R. § 1614.204(e) (1995).

c. Discovery --

The administrative judge may extend discovery deadlines where the complexity of the litigation so requires.

The initial decision on an individual complaint is due within 180 days from filing. Class complaints can present more complex issues and can be more cumbersome to manage. This proposal recognizes that complex litigation may take more time.

d. Settlement --

The administrative judge will review any proposed settlement for whether it is fair and adequate for the class as a whole.[446] The administrative judge will approve a settlement that meets these criteria, and will order notice to the class. Any class member who objects to the settlement may petition the MSPB for review within 35 days of issuance of the notice. The MSPB will review de novo the adequacy and fairness of the settlement, and will issue a final decision binding all parties.

Current EEO procedures require the administrative judge to provide a recommended decision on the appropriateness of a class settlement, but let the agency make the decision.[447] The proposed procedures eliminate this conflict of interest.

---

[446] *Cf.* Parker v. Anderson, 667 F.2d 1204, *cert. denied*, 459 U.S. 828 (1982) (reviewing district court's approval of a settlement of a class action suit alleging discrimination by Bell Helicopter Company).

[447] 29 C.F.R. § 1614.204(g) (1995).

e. The hearing and the initial decision --

The administrative judge will conduct a hearing in accordance with the procedures applicable to individual complaints. The initial decision will specify class and individual relief where appropriate.

Current EEOC procedures require a recommended decision on class and individual relief, with the agency head making the final agency decision.[448] Removing the agency from the decision making process eliminates the current conflict of interest, enhances confidence in the decision, and should lead to fewer appeals.

f. Remedies --

If the administrative judge finds no class-wide discrimination, but finds that the class representative suffered individual discrimination, the administrative judge will award the class representative individual relief available under the applicable discrimination statute for individual complaints.

If the administrative judge finds class-wide discrimination, the initial decision will order the respondent agency to cease the discriminatory policy or practice and will specify appropriate individual relief for the class representative. The

---

[448] 29 C.F.R. § 1614.204(l) (1995).

administrative judge will determine individual relief for other class members following the finality of the MSPB decision.[449]

These procedures generally follow current EEOC procedures.[450]

g. Administrative review --

The initial decision will become the MSPB final decision unless the respondent agency or the class representative files a petition for review with the MSPB within 35 days of the initial decision. The standard of review will be the same as for individual complaints.

h. Notice of the decision; individual relief --

The agency will notify the class within 10 days of receiving the MSPB final decision. The notice will advise class members of their rights to seek individual relief if the decision includes a finding of class-wide discrimination.

A class member seeking relief will submit to the administrative judge and the agency documentary evidence and affidavits establishing that the class member was aggrieved by the class-wide discrimination during the period from 45 days before the class representative contacted the EEO counselor to the date the discriminatory policy or practice ceased. The submission will describe with particularity the injury suffered.

---

[449] See *infra* part III.B.2.h.

[450] 29 C.F.R. § 1614.204(1) (1995).

The agency may present opposition evidence in similar form. The administrative judge may order additional documentation and affidavits from either party.

The administrative judge will fashion individual equitable relief, including back pay, based on the record. The agency will have the right to demand a hearing, including pre-hearing discovery, to determine the amount of any compensatory damages. The administrative judge will issue an initial decision on individual relief. Either party may petition the MSPB for review within 35 days. The MSPB will apply the same standard of review to the individual remedy as to individual complaints.

EEOC regulations currently permit class members to file timely claims for individual relief following a final decision that includes findings of class-wide discrimination. The agency rules on these claims and the claimant may appeal to the EEOC or file a civil action in U.S. district court.[451] The agency, as the confirmed discriminator, has an obvious conflict of interest. Transferring this responsibility to an administrative judge should bolster the claimant's confidence in the decision, leading to fewer appeals.

EEOC regulations do not provide for an administrative hearing on individual relief[452] even though that relief can include compensatory damages of up to $300,000 for intangible

---

[451] 29 C.F.R. § 1614.204(l)(3) (1995).

[452] 29 C.F.R. § 1614.204(l)(3) (1995).

injuries such as pain and suffering. Equitable relief such as back pay, promotion, and restored leave, also can be significant, but at least it is quantifiable. The agency should have the opportunity to test claims for intangible damages of that potential magnitude in an adversarial hearing.

i. Judicial review --

The agency will have no right to judicial review of the MSPB final decision. The class representative may file a civil action for a trial de novo in U.S. district court within 90 days of a final decision denying class certification or otherwise dismissing all or part of a complaint; within 90 days of the MSPB final decision on the merits; any time after 180 days from filing the complaint, in the absence of a final decision (if no appeal is pending); or any time after 180 days from appealing to the MSPB, if the MSPB has not yet issued a decision. A class member may file a civil action within 90 days of the MSPB final decision on that class member's individual remedy.[453]

These procedures preserve current opportunities for judicial review.

---

[453] The plaintiff could limit the civil trial to the issue of remedy, invoking administrative estoppel against the agency on the findings of class-wide discrimination. Haskins v. Department of the Army, 808 F.2d 1192, 1199 & n.4 (6th Cir.) *cert. denied*, 484 U.S. 815 (1987); Pecker v. Heckler, 801 F.2d 709, 711 n.3 (4th Cir. 1986); Moore v. Devine, 780 F.2d 1559, 1562 (11th Cir. 1986).

*3. **Mixed cases** --* The non-mixed civil service appeals process generally applies, as modified below, when an employee alleges that unlawful discrimination was the basis for a personnel action from which the employee has MSPB appeal rights.[454]

*a. **Counseling** --*

The employee may elect to pursue EEO counseling by contacting the MSPB EEO counselor within 30 days of the effective date of the personnel action. The counseling period (30 days) and procedures applicable to individual discrimination complaints apply to counseling in mixed appeals.[455]

This proposal reflects the removal of the respondent agency from the decision-making process. The proposal retains the option for EEO counseling, however, because counseling is a relatively effective means of resolving cases informally.[456] An individual has 45 days to contact a counselor regarding a pure discrimination complaint, but only 30 to file a pure MSPB appeal. The proposed procedure for mixed appeals provides a workable rule by requiring the employee to either contact a counselor or file an appeal within 30 days of the effective date of the personnel action. The earlier deadline will impose no hardship on

---

[454] *See supra* notes 44-53 and accompanying text.

[455] *See supra* part III.B.1.a.

[456] *See supra* note 164 and accompanying text (statistics on complaint resolution during counseling period).

employees, because the notification of the personnel action will advise the employee of appeal rights and deadlines.[457]

b. Filing the appeal --

The employee may file a mixed appeal within the first 30 days after the effective date of the personnel action, or within 15 days of completing EEO counseling.

An employee who chooses not to seek counseling will comply with the general MSPB deadline for filing appeals. An employee who contacts an EEO counselor may, during that first 30 days, abandon the counseling effort and file directly with the MSPB. The 15-day window applicable to individual discrimination complaints[458] will apply to the mixed appeal if the employee completes counseling. These deadlines reinforce consistency among pure discrimination complaints and mixed appeals.

c. The hearing --

The parties will conduct discovery and the administrative judge will hold a hearing according to procedures for non-mixed civil service appeals.[459]

This procedure follows current law.[460]

---

[457] *See* 5 C.F.R. § 1201.21 (1995).

[458] *See supra* part III.B.1.b.

[459] *See supra* notes 44-49 and accompanying text.

[460] 5 C.F.R. § 1201.152 (1995).

d. The initial decision --

The administrative judge will issue an initial decision within 120 days of the date the appellant filed the mixed appeal. The decision will address the civil service issues and the discrimination issues, and award relief as appropriate.

The deadline for these initial decisions is 60 days earlier than that for initial decisions on pure discrimination complaints.[461] The tighter schedule reflects the immediate hardship that a mixed case appellant may sustain when subjected to an otherwise appealable personnel action such as a removal, a long suspension, or a reduction-in-force. The due process prerequisites to Chapters 43 and 75 actions, moreover, create an administrative record that reduces the extent of discovery necessary.[462]

e. Administrative review --

Either party may petition the MSPB for review within 35 days of the initial decision. The OPM may only petition for review of civil service issues, and only in substantial impact cases.[463]

These procedures preserve current rights to administrative review.

---

[461] The deadline is statutory. 5 U.S.C. § 7702 (1994).

[462] *See supra* notes 59, 66.

[463] *See* supra note 51 and accompanying text.

f. EEOC petition for reconsideration --

The EEOC may to petition the MSPB for reconsideration of a final decision that the EEOC believes reflects an erroneous interpretation of Federal discrimination law or policy. The EEOC petition is timely if filed within 35 days of the MSPB final decision. The MSPB will dismiss a pending EEOC petition for reconsideration if the appellant files a civil action for a trial de novo in U.S. district court, or if the appellant abandons all discrimination issues and appeals the civil service issues to the U.S. Court of Appeals for the Federal Circuit.

Mixed case appellants will no longer petition the EEOC for review of the MSPB decision. The Special Panel will no longer exist. Cases will no longer bounce between the MSPB and the EEOC. The EEOC's right to petition the MSPB for reconsideration, however, is an opportunity to inject that agency's expertise into the process. The EEOC's position will not bind the MSPB, but its participation will highlight problem areas that may warrant the attention of legislators or policy makers.

The EEOC petition will not interfere with the appellant's right to judicial review. One may assume that in most cases the appellant and the EEOC will coordinate their efforts, but the appellant retains the opportunity to file in district court or the Federal Circuit.

g. Judicial review --

The mixed case appellant may file a civil action in U.S. district court for a trial de novo on the discrimination issues within 90 days of a final decision dismissing the mixed appeal; within 90 days of the MSPB's final decision on the merits of the mixed appeal; any time after 120 days from filing the mixed appeal, in the absence of a final decision, if no petition for review or other appeal from a decision of the administrative judge is pending; or any time after 120 days from petitioning the MSPB to review a decision of the administrative judge, if the MSPB has not yet issued a final decision. A complainant alleging age discrimination may abandon the administrative process and file a civil action on the age claim only at any time within 180 days of the alleged discriminatory event, after providing the MSPB 30 days' notice of intent to sue.

The district court judge will only review civil service issues where the appellant obtained an MSPB final decision thereon, and will apply the same standard of review that the Federal Circuit would apply to the same issues.[464]

The appellant may abandon the discrimination claim and appeal civil service issues to the U.S. Court of Appeals for the Federal Circuit under the procedures currently applicable to MSPB cases.[465]

---

[464] I.e. review of the record to determine whether the MSPB decision was arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law. *See* supra note 56 and accompanying text.

[465] *See supra* note 244 and accompanying text.

The pendency of an EEOC petition for reconsideration of a final MSPB decision will not extend the appellant's deadlines for filing a civil action in U.S. district court, or an appeal of the civil service issues in the U.S. Court of Appeals for the Federal Circuit.

These procedures preserve existing rights of judicial review and ensure that EEOC petitions for reconsideration do not prolong the overall process.

4. Grievance arbitration -- One may expect unions to guard jealously the opportunity for binding arbitration, and properly so because arbitration furthers congressional policy favoring collective bargaining.[466] The proposals below preserve the role of grievance arbitration in resolving employment disputes. Bargaining unit employees retain current rights to elect between the negotiated grievance procedure and available statutory appeals procedures. The MSPB, however, will perform all administrative review of arbitration decisions on disputes otherwise within MSPB jurisdiction. Exclusive MSPB jurisdiction for administrative review will integrate the negotiated grievance procedure with the broader system of Federal employment dispute resolution, ensuring consistent interpretation and application of

---

[466] *See* 5 U.S.C. § 7701(a) (1994) (Congress finds labor organizations' collective bargaining in the civil service are in the public interest); 5 U.S.C. § 7121(a) (1994) (all collective bargaining agreements will include a negotiated grievance procedure that shall provide for binding arbitration).

civil service and discrimination laws regardless of the fact-finding forum.

a. Discrimination grievances --

An employee grieving a pure discrimination issue must exhaust the negotiated grievance procedure. The employee will have no right to administrative or judicial review if the union declines to invoke arbitration of the agency's grievance decision. Age discrimination grievances, however, remain an exception to exhaustion requirements. The employee may file a civil action at any time within 180 days from the alleged discriminatory event, after providing 30 days' notice to the MSPB.

The EEOC currently reviews agency decisions on discrimination grievances absent arbitration.[467] The EEOC, however, will no longer have jurisdiction over discrimination complaints. The MSPB does not review agency grievance decisions on mixed grievances,[468] and will not review agency decisions on other grievances under the proposed procedures. It is unrealistic to expect an appellate body to perform an effective review of the record emanating from a grievance *sans* arbitration. A bargaining unit employee who wishes to grieve a discrimination

---

[467] 29 C.F.R. § 1614.401(c) (1995).

[468] Jones v. Department of the Navy, 898 F.2d 133, 134-35 (Fed. Cir. 1990); Mawson v. Department of the Navy, 48 M.S.P.R. 318, 322 (1991).

issue will first need to ascertain the union's willingness to arbitrate the matter. The union has a duty to the employee not to act arbitrarily, discriminatorily, or in bad faith when it determines whether to invoke arbitration.[469]

An alternative approach would allow the complainant to file a civil action within 90 days of the agency decision where the union does not invoke arbitration. Such an option, however, would create a short-cut through administrative exhaustion. The agency controls neither the election of forum nor the union's decision whether to arbitrate. An employee desiring a civil trial at the earliest opportunity would elect the grievance procedure, convince the union not to arbitrate, and head directly to U.S. district court. That action would undermine the ability of the administrative process to resolve employment disputes and avoid flooding the courts.

(1) Administrative review --

Either party may petition the MSPB for review within 35 days of an arbitration decision. The MSPB will review whether the arbitration decision was arbitrary or capricious, or reflected an erroneous interpretation of law, rule, or regulation.

The FLRA will no longer have jurisdiction over discrimination grievances. A bargaining unit employee's

---

[469] Vaca v. Sipes, 386 U.S. 171, 190 (1967); National Fed'n of Fed. Employees and Crawford, 23 F.L.R.A. 684 (1984). Violation of this duty of fair representation constitutes an unfair labor practice. 5 U.S.C. § 7116(b) (1994).

interests in a grievances involving personal statutory and regulatory rights are distinct from the union's interest in collective bargaining.[470] When an employee elects the negotiated grievance procedure for a discrimination complaint or appealable personnel action, any resulting arbitration decision turns on the individual's rights, not those of the union.[471] The FLRA was designed to deal with the relations between institutions -- unions and agencies.[472] Allowing the FLRA to dabble in discrimination law introduces needless confusion and undermines system integrity. The MSPB should displace the FLRA's jurisdiction to review these arbitration decisions. Consolidation of discrimination complaints jurisdiction in the MSPB also will eliminate EEOC review of arbitration decisions. All roads for administrative review lead to the MSPB.

The MSPB currently reviews arbitration awards only in mixed grievances, and only for whether the arbitrator erred in interpreting a law, rule, or regulation.[473] This exceptional

---

[470] *See* Cornelius v. Nutt, 472 U.S. 648, 663-64 (1985) (application of the harmful error rule turns on prejudice to the grievant, not the union; the union can file its own grievance).

[471] *Id.*

[472] "[T]he FLRA, unlike the MSPB, is not a 'personnel' agency. The FLRA is an agency that adjudicates disputes between agencies and unions, (and between unions and employees) not between agencies and employees." *Hearings, supra* note 20 (statement of John N. Sturdivant, National President, American Federation of Government Employees).

[473] Robinson v. Department of Health and Human Servs., 30 M.S.P.R. 389 (1986).

deference to arbitrator fact-finding is unwarranted. Arbitrators in Federal-sector discrimination and civil service cases serve as the functional equivalent of administrative judges; they apply discrimination and civil service laws and regulations directly to the disputes.[474] Arbitrators of private-sector grievances, on the other hand, merit greater deference because they do not apply statutes directly; they enforce contracts according to the "industrial common law of the shop."[475] There is no Federal-sector "common law of the shop."

The MSPB and EEOC currently review administrative judges' decisions *de novo*, with deference to credibility findings based on observation of witness demeanor.[476] The proposal will not

---

[474] *See* 5 U.S.C. § 7121(d)-(e) (1994).

[475] In the private sector, contractual rights and statutory rights

> have legally independent origins . . . . As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the 'industrial common law of the shop' and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties. . . . Thus an arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII.

Alexander v. Gardner-Denver Co., 415 U.S. 36, 52-54 (1974).

[476] Jackson v. Veterans Admin., 768 F.2d 1325, 1331 (Fed. Cir. 1985).

subject arbitration decisions to the same degree of administrative scrutiny, but will require that they be based on correct interpretations of law and not be arbitrary or capricious[477] -- the same standard that the Federal Circuit currently applies to MSPB and arbitration decisions.[478]

(2) EEOC petition for reconsideration --

The EEOC may petition the MSPB for reconsideration of an MSPB decision, on review of a discrimination grievance arbitration award, that the EEOC believes reflects an erroneous interpretation of Federal discrimination law or policy. The EEOC's petition is timely if filed within 35 days of the MSPB decision.

The MSPB will dismiss a pending EEOC petition for reconsideration if the grievant files a civil action for a trial de novo in U.S. district court.

These procedures create the same opportunities for EEOC input as discussed in the individual complaints process,[479]

---

[477] An arbitration award would be arbitrary and capricious if, *inter alia*, the award was based on a gross mistake of fact that changed the result, *cf.* Redstone Arsenal and American Fed'n of Gov't Employees, 18 F.L.R.A. 374 (1985); the award reflected arbitrator bias or partiality, *cf.* Department of the Air Force, Hill Air Force Base and American Fed'n of Gov't Employees, 39 F.L.R.A. 103 (1991); or the arbitrator refused to consider pertinent and material evidence, *cf. Id.*

[478] 5 U.S.C. § 7703(c) (1994).

[479] *See supra* part III.B.1.j.

although the EEOC can petition for review only if a party has already obtained MSPB review of the arbitration decision.

(3) Judicial review --

The grievant may file a civil action in U.S. district court for a trial de novo within 90 days of the arbitrator's decision, absent an earlier petition for MSPB review; within 90 days of the MSPB's decision on review; or any time after 180 days from petitioning the MSPB for review, absent an MSPB final decision. The pendency of an EEOC petition for reconsideration of an MSPB decision will not extend the grievant's deadline for filing a civil action.

The grievant's rights to judicial review will be substantially the same as if the grievant had filed a discrimination complaint with the MSPB.[480]

b. Chapters 43 and 75 grievances --

An employee grieving a Chapter 43 or 75 action who does not allege discrimination as an affirmative defense will exhaust the negotiated grievance procedure. The employee will have no opportunity for administrative or judicial of review if the union declines to invoke arbitration over the agency's grievance decision.[481]

---

[480] *See supra* part III.B.1.k.

[481] *Cf.* Mawson v. Department of the Navy, 48 M.S.P.R. 318 (1991) (MSPB will not review mixed grievance absent an arbitration decision).

These procedures follow current law.[482]

(1) Administrative review --

Either party may petition the MSPB for review within 35 days of an arbitration decision. The OPM may do so only in substantial impact cases.[483] The MSPB will review whether the decision was arbitrary or capricious or based on an erroneous interpretation of law, rule, or regulation.

These procedures expand MSPB jurisdiction to include the review of arbitration decisions on Chapters 43 and 75 grievances at the request of either party or the OPM. The agency currently has no right to administrative or judicial review if the Chapter 43 or 75 grievant prevails at arbitration; the OPM can seek judicial review only in substantial impact cases.[484] Insulation of an arbitrator's legal error from review can create an incentive for employee forum shopping and undermine the development and application of a consistent body of civil service law.

(2) Judicial review --

---

[482] *See supra* part I.F.3.

[483] *See supra* note 51 and accompanying text.

[484] *See* 5 U.S.C. §§ 7121(f), 7703(d) (1994); *see also supra* note 51 and accompanying text.

The grievant or the OPM (in a substantial impact case) may appeal the MSPB decision to the U.S. Court of Appeals for the Federal Circuit.

This procedure follows current law.[485]

c. Mixed grievances --

An employee who grieves a Chapter 43 or Chapter 75 action and raises the affirmative defense of unlawful discrimination must exhaust the negotiated grievance procedure. The employee cannot obtain administrative or judicial review if the union declines to invoke arbitration of the agency's grievance decision. Age discrimination claims remain an exception to exhaustion; the grievant may file a civil action on the age claim only within 180 days of the alleged discriminatory event, after providing 30 days' notice to the MSPB.

These procedures follow current law.[486]

(1) Administrative review --

Either party may petition the MSPB for review within 35 days of an arbitration decision. The OPM can only petition for review of the civil service issues, and only in substantial impact cases.[487] The MSPB will review whether the decision was arbitrary

---

[485] See *supra* part I.F.3.

[486] See *supra* part I.F.4.

[487] See *supra* note 51 and accompanying text.

or capricious or based on an erroneous interpretation of law, rule, or regulation.

As with Chapters 43 and 75 grievances, this proposal expands MSPB jurisdiction to encompass review of mixed grievances at the request of either party or the OPM. Currently, only the grievant may appeal the outcome of the arbitration award in a mixed case.[488] Insulation of an arbitrator's legal error from review can create an incentive for employee forum shopping and can undermine the development and application of a consistent body of civil service and discrimination law.

(2) EEOC petition for reconsideration --

The EEOC may petition the MSPB for reconsideration of a decision, on review of a mixed grievance arbitration award, that the EEOC believes reflects an erroneous interpretation of Federal employment discrimination law or policy. The EEOC petition is timely if filed within 35 days of the MSPB decision. The MSPB will dismiss a pending EEOC petition for reconsideration if the mixed case grievant files a civil action for a trial de novo in U.S. district court, or if the grievant abandons the discrimination issues and appeals the civil service issues to the U.S. Court of Appeals for the Federal Circuit.

---

[488] 5 U.S.C. § 7121(d) (1994).

These procedures align the negotiated grievance process with the statutory appeals process.[489]

(3) Judicial review --

The grievant may file a civil action in U.S. district court for a trial de novo of the discrimination issues within 90 days of the arbitrator's decision, absent a prior petition for MSPB review; within 90 days of the MSPB's final decision on a petition for review; or any time after 180 days from petitioning the MSPB for review of arbitrator's award, if the MSPB had not yet issued a decision. The district court judge will review the civil service issues only where the appellant obtained an MSPB decision on review of the arbitration award, and will apply the same standard of review that the Federal Circuit would apply to the same issues.[490] The district court judge will review the arbitrator's decision with the deference due the arbitrator's findings of fact.

The appellant may abandon the discrimination issue and appeal the MSPB's decision on review of civil service issues to the U.S. Court of Appeals for the Federal Circuit.[491]

The pendency of an EEOC petition for review of an MSPB decision will not extend the grievant's deadline for filing a

---

[489] *See supra* part III.B.1.j.

[490] I.e. whether the decision was arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law. *See supra* note 266 and accompanying text.

[491] *See supra* note 244 and accompanying text.

civil action in district court or an appeal in the Federal Circuit.

The grievant's opportunities for judicial review will be substantially the same as under the statutory mixed appeals process.[492]

d. Prohibited personnel practices other than discrimination --

The alleged victim of a prohibited personnel practice other than discrimination, in a case other than a Chapter 43 or 75 action, may elect between the negotiated grievance procedure (if it does not exclude such matters) and contacting the Office of Special Counsel. An employee who elects the NGP cannot obtain administrative or judicial review of the agency decision if the union declines to invoke arbitration.

These procedures follow current law.[493]

(1) Administrative review --

Either party may petition the MSPB for review within 35 days of an arbitration decision. The MSPB will review whether the decision was arbitrary or capricious or based on an erroneous interpretation of law, rule, or regulation.

---

[492] See *supra* part III.B.3.g.

[493] See *supra* part I.F.5.

The MSPB will assume the FLRA's jurisdiction over these arbitration awards, for the reasons stated in support of displacing FLRA jurisdiction over discrimination grievances.[494]

(2) Judicial review --

The merits of the arbitration decision will not be judicially reviewable.

Employees who are not covered by a negotiated grievance procedure must enlist the services of the OSC to investigate prohibited personnel practices other than discrimination. A whistleblower who exhausts remedies with the OSC may file an IRA with the MSPB and obtain judicial review thereon.[495] Otherwise, the employee is left to the agency's administrative grievance procedure[496] and has no right to judicial redress.

Conditions of employment are the heart of collective bargaining, and the negotiated grievance procedure empowers the union to enforce statutory or contractual requirements. Arbitration decisions, however, generally are not judicially reviewable unless similar disputes outside the collective bargaining context are reviewable (such as Chapters 43 and 75 actions). The proposed procedures are consistent with current law: bargaining unit employees enjoy the access to the NGP that derives from union representation. Granting bargaining unit

---

[494] *See supra* notes 470-472 and accompanying text.

[495] *See supra* notes 71-75 and accompanying text.

[496] *See* 5 C.F.R. Part 771 (1995).

employees a right to judicial review that employees outside bargaining units do not enjoy, however, would alter the balance of rights between bargaining unit and non-bargaining unit employee. The proposal maintains alignment of employee rights and remedies regardless of collective-bargaining status.

e. Other personnel actions --

An available negotiated grievance procedure is the exclusive recourse for employees to pursue disputes not involving prohibited personnel practices, Chapter 43 or 75 actions, or matters statutorily excluded from the grievance procedure.[497] The employee has no further right of review if the union declines to invoke arbitration of the agency's grievance decision.

These procedures follow current law.[498]

(1) Administrative review --

Either party may petition the MSPB for review within 35 days of an arbitration decision if the underlying personnel action is one that would fall within MSPB appellate jurisdiction but for the coverage of the negotiated grievance procedure. The MSPB will review whether the decision was arbitrary or capricious or based on an erroneous interpretation of law, rule, or regulation.

---

[497] *See* 5 U.S.C. § 7121(c) (1994); *see also* Carter v. Gibbs, 909 F.2d 1452 (Fed. Cir.), *cert. denied sub nom.* Carter v. Goldberg, 498 U.S. 811 (1990).

[498] *See supra* part I.F.1.

A negotiated grievance procedure preempts MSPB appellate jurisdiction over matters other than Chapters 43 and 75 actions, discrimination cases, and whistleblower IRAs, if the NGP does not exclude the particular type of dispute from its coverage.[499] The proposal ensures that the MSPB will perform the administrative review of all hearing decisions, be they from arbitrators or administrative judges, regarding matters within its appellate jurisdiction.[500] The MSPB will no longer share with the FLRA its jurisdiction to interpret these civil service laws.

If the grievance involves a personnel action over which the MSPB would not have appellate jurisdiction, even absent a negotiated grievance procedure, the FLRA will review the arbitration award on exceptions from the parties.[501] Congress has not chosen to create MSPB appeal rights, and there is no threat of conflicting interpretations of civil service laws. FLRA jurisdiction, therefore, is consistent with the labor policy manifested in the very broad definition of grievance.[502]

(2) Judicial review --

The grievant may appeal to the U.S. Court of Appeals for the Federal Circuit if the grievant would have had MSPB appeal rights

---

[499] 5 U.S.C. § 7121 (1994); 5 C.F.R. § 1201.3(b)-(c) (1995).

[500] *See supra* part I.B.1 (describing MSPB appellate jurisdiction).

[501] 5 U.S.C. § 7122 (1994).

[502] *See supra* note 248.

but for the coverage of the negotiated grievance procedure. The OPM may also do so in substantial impact cases.[503] The Federal Circuit will apply the same standard of review that it applies to other appeals from arbitration decisions.[504]

These procedures actually expand the grievant's opportunity for judicial review. The FLRA currently performs administrative review of these arbitration decisions, and the FLRA decisions generally are not subject to judicial review.[505] The common thread to all these proposals is an attempt to align rights and remedies regardless of forum. The arbitrator steps in for the administrative judge in applying Federal laws to the facts of grievances. There is no sound reason to provide for more limited review of an arbitrator's decision than of an administrative judge's decision.

Unlike administrative review, the availability of judicial review turns not only on the nature of the dispute but also on whether the grievant would otherwise have appeal rights. Jurisdiction for administrative review is broader because the MSPB displaces existing FLRA jurisdiction to review exceptions. The limits on judicial review ensure that bargaining unit employees enjoy the same, but not greater, rights and remedies as other employees.

---

[503] *See* 5 U.S.C. § 7703(d) (1994).

[504] *See* 5 U.S.C. § 7703(c) (1994).

[505] *See supra* note 254.

C. Arbitrator Powers

An arbitrator's remedial powers will be coextensive with the powers of an administrative judge or Administrative Law Judge presiding over the same type of dispute. The agency will forward a copy of the administrative record to the Office of Special Counsel if an arbitrator finds that an employee has committed a prohibited personnel practice against the grievant in a particular case.

Part II discussed the anomalous power of an arbitrator to order the discipline of an employee whom the arbitrator finds committed a prohibited personnel practice against the grievant.[506] The discipline would be not only unconstitutional but also bad policy if the agency truly were bound to impose it based solely upon an arbitrator's order. No other fact-finding body can order such discipline in a proceeding to which the putative offender is not a party. Why create an incentive for forum shopping when an alternative is available? Referring the matter to the OSC affords the entity tasked with prosecuting disciplinary actions against merit offenders an opportunity to bring its expertise to bear and take action as appropriate.[507]

IV. Conclusion

---

[506] *See supra* part II.D.3.

[507] *See supra* part I.C.

> The current discrimination complaint process is lengthy, cumbersome, and costly in terms of resources and emotional expenditures, and is frequently used for non-discrimination problems. Employees perceive it as management-controlled . . . . Conversely, managers see the system as conducive to abuse and as destructive, rather than helpful, to the resolution of legitimate complaints at the agency level.[508]

These remarks described the situation in 1977, yet they are apropos of the "reformed" discrimination complaint process more than 18 years later. This is hardly a ringing endorsement for the EEOC's adherence to the CSC model of complaint processing. The Personnel Management Project leadership were right: The MSPB should have "jurisdiction over discrimination complaints as well as other types of appeals, in order to establish a single organizational unit to resolve virtually all types of complaints from Federal employees."[509] Undue delay and baffling mixed case procedures are two legacies of the failure to follow this recommendation.

Somewhere along the line President Carter and the 95th Congress lost sight of the basic premise that unlawful employment discrimination is a prohibited personnel practice that violates merit principles.[510] They created the necessary independent body to protect the merit system, but they denied it the jurisdiction necessary to accomplish the mission.

---

[508] 1 PERSONNEL MANAGEMENT PROJECT, FINAL STAFF REPORT 73 (Dec. 1977).

[509] *Id.*

[510] 5 U.S.C. §§ 2301(b)(2), 2302(b)(1) (1994).

The proposals in part III derive from the concept that consistency, uniformity, and simplicity are important aspects of a system that is, after all, supposed to be the preferred alternative to court litigation. Those proposals overhaul the administrative processes to meet the concerns described in part II.[511]

- the MSPB will remain independent, free from the conflict of interest with which the CSC struggled
- Federal agencies will not have conflicts of interest, because they will parties, not investigators or decision makers, in cases in which they are charged with discrimination
- revised procedures will be simpler, more uniform, and less prone to delay
- equal employment opportunity counselors will be independent, well-trained MSPB employees
- the EEOC, FLRA, and MSPB will no longer have overlapping jurisdiction; the MSPB will conduct all administrative review
- Federal employees' rights and remedies will remain at least as protective as those that private-sector employees enjoy
- from all these improvements should follow an increased level of employee confidence in the system's fairness

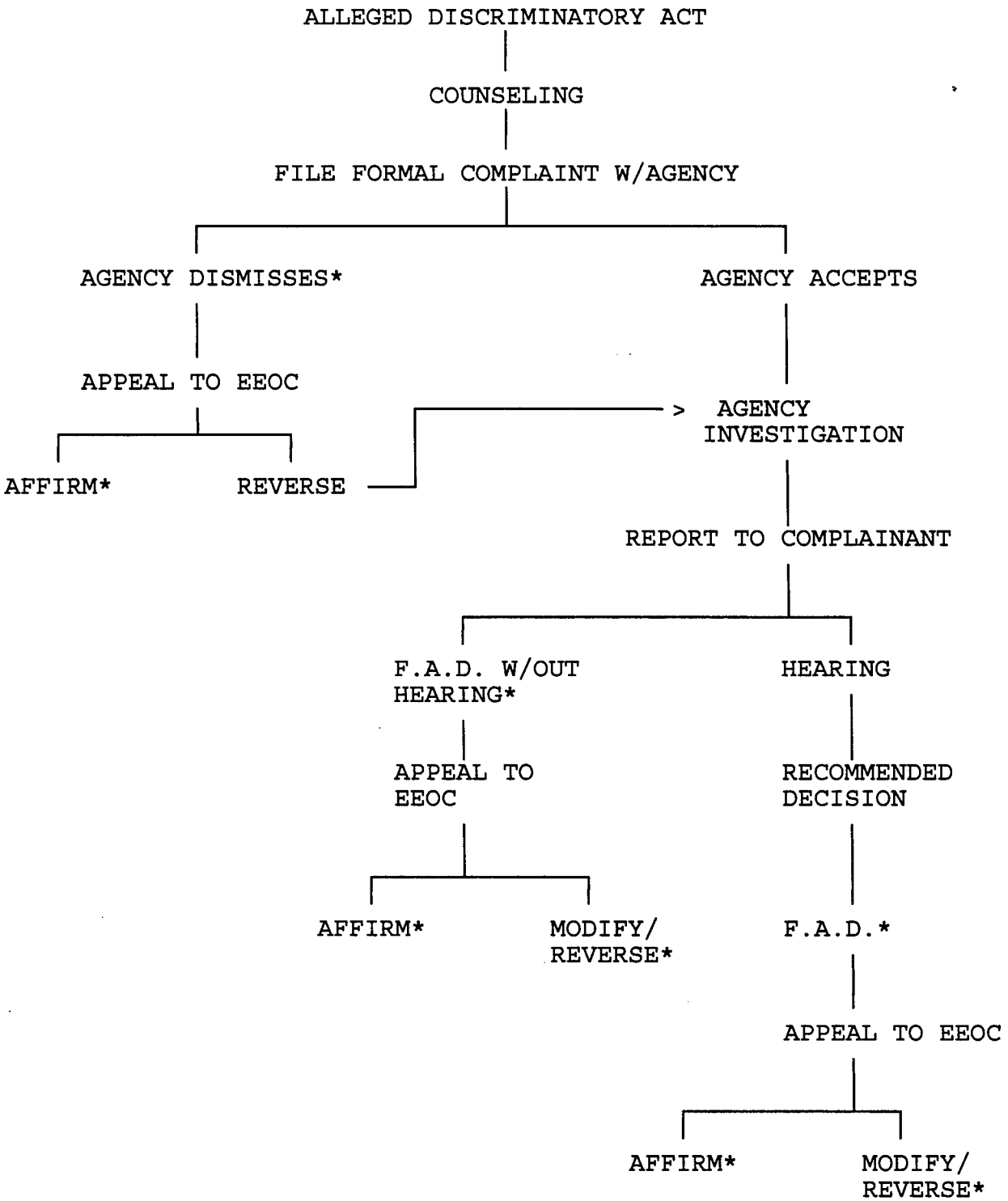
These reforms require no radical new programs or additional government agencies; they merely refocus the efforts of existing institutions to create a logical, integrated system for protecting *all* merit principles, including discrimination-free employment. These initiatives should be at least budget neutral, and may even engender savings. Implementing these changes will

---

[511] *See supra* part II.D.

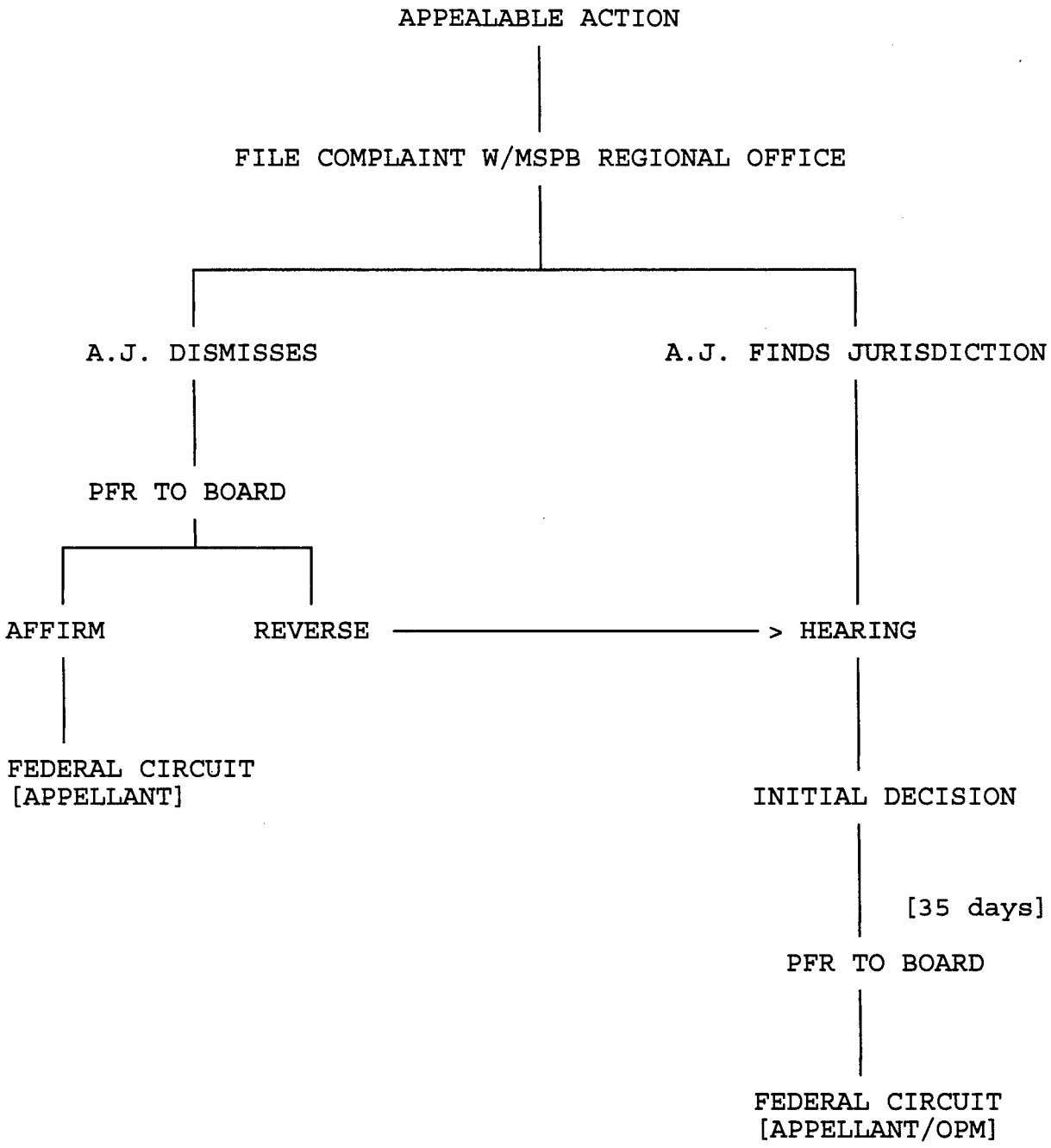
not be painless for individuals such as agency investigators who find themselves without jobs, and bureaucracies will squabble over the financial and staffing impacts. The alternative, however, is to persist with a system that wastes resources and serves poorly the needs of the parties, the Federal government, and the American taxpayer.

PURE DISCRIMINATION COMPLAINTS [CURRENT]

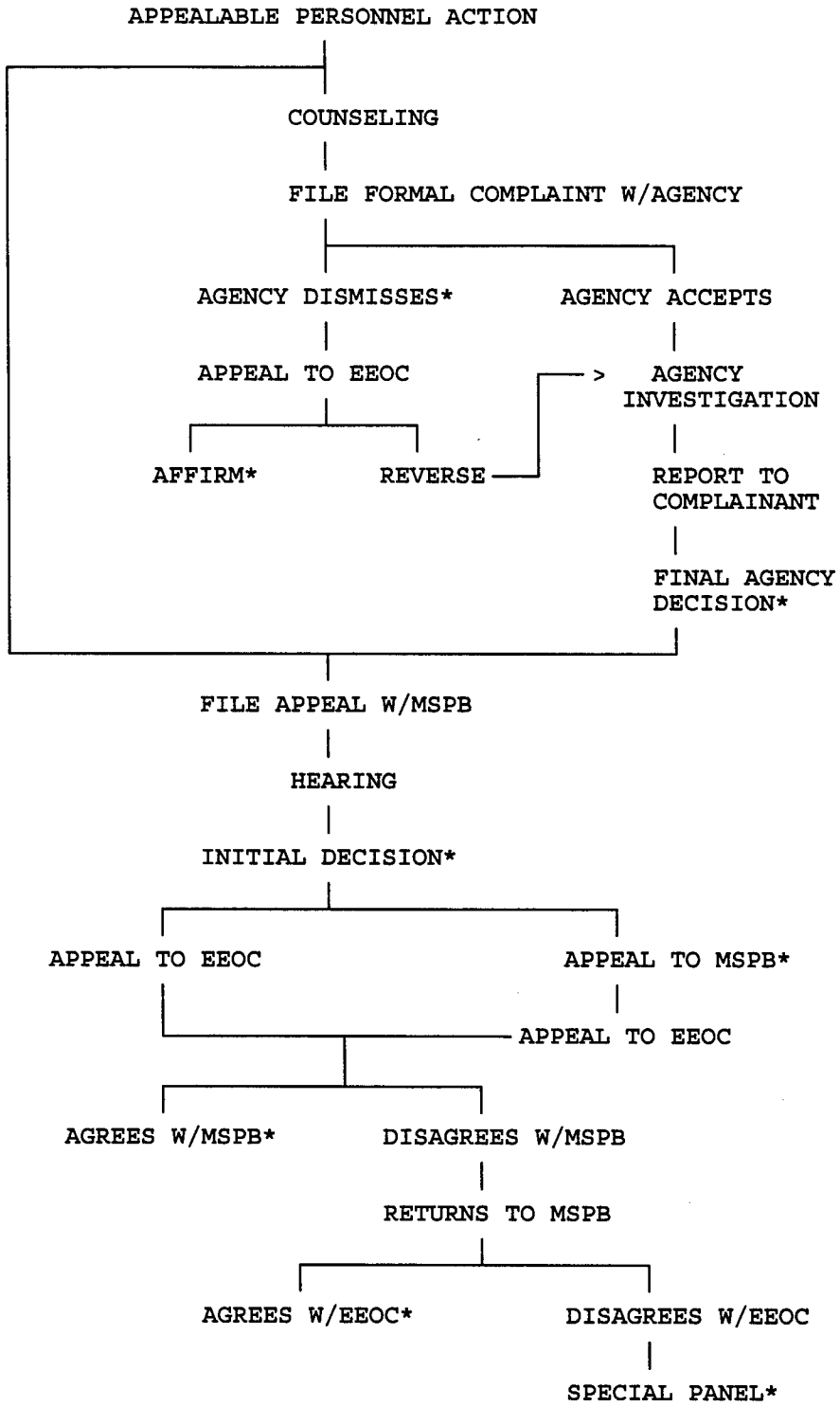


* = Complainant may pursue civil action *de novo*

PURE MSPB APPEAL [CURRENT & REVISED]

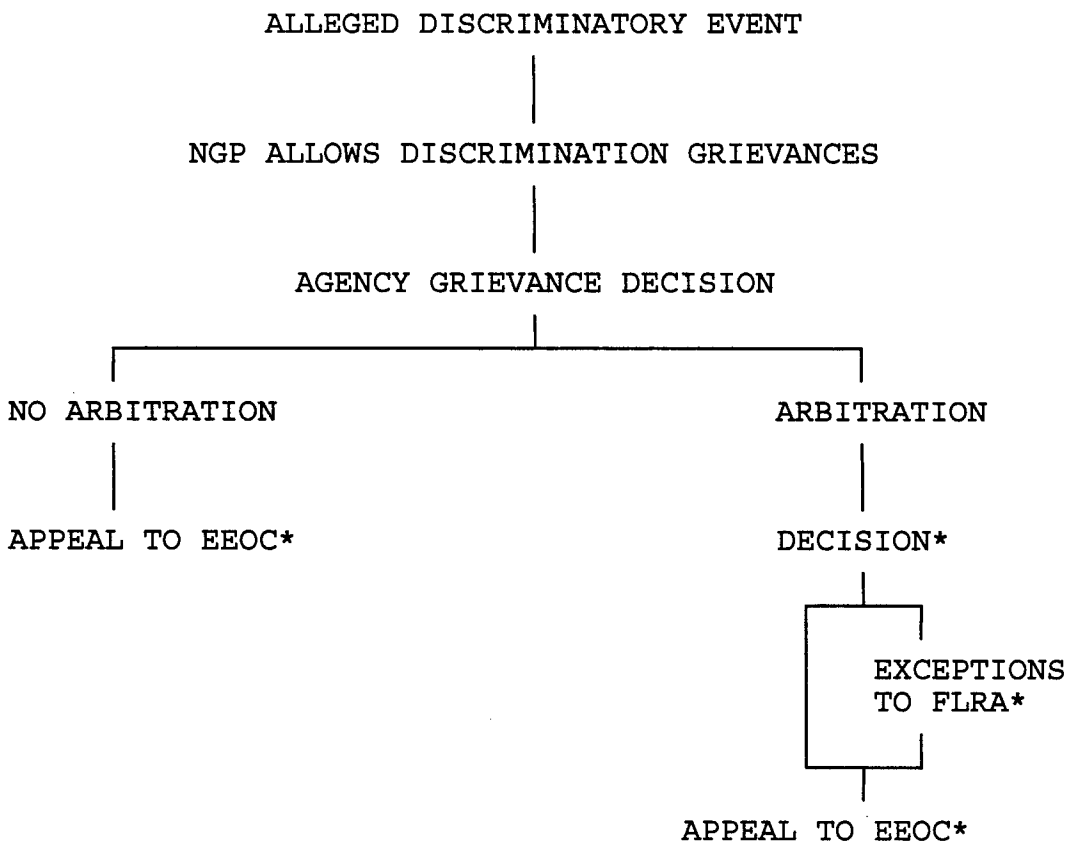


MIXED CASES [CURRENT]



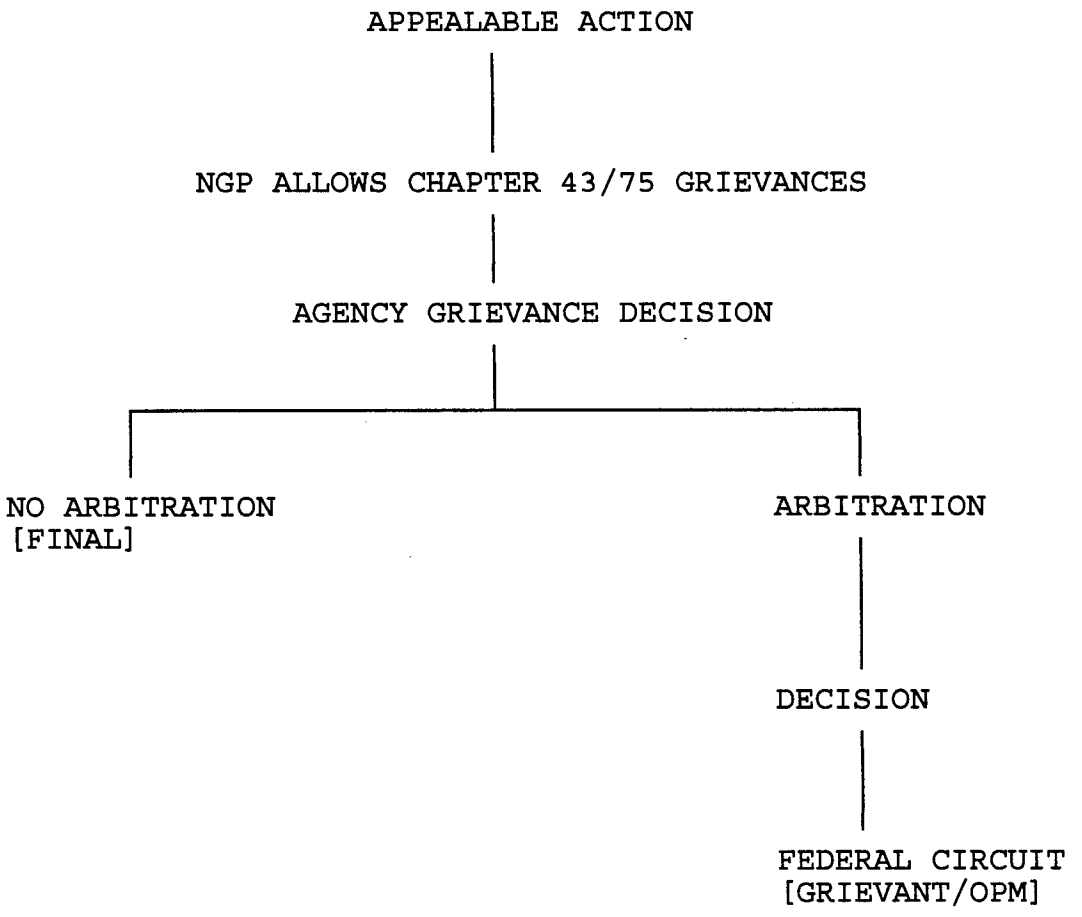
* = Complainant may pursue civil action *de novo* on discrimination issue

DISCRIMINATION GRIEVANCES [CURRENT]

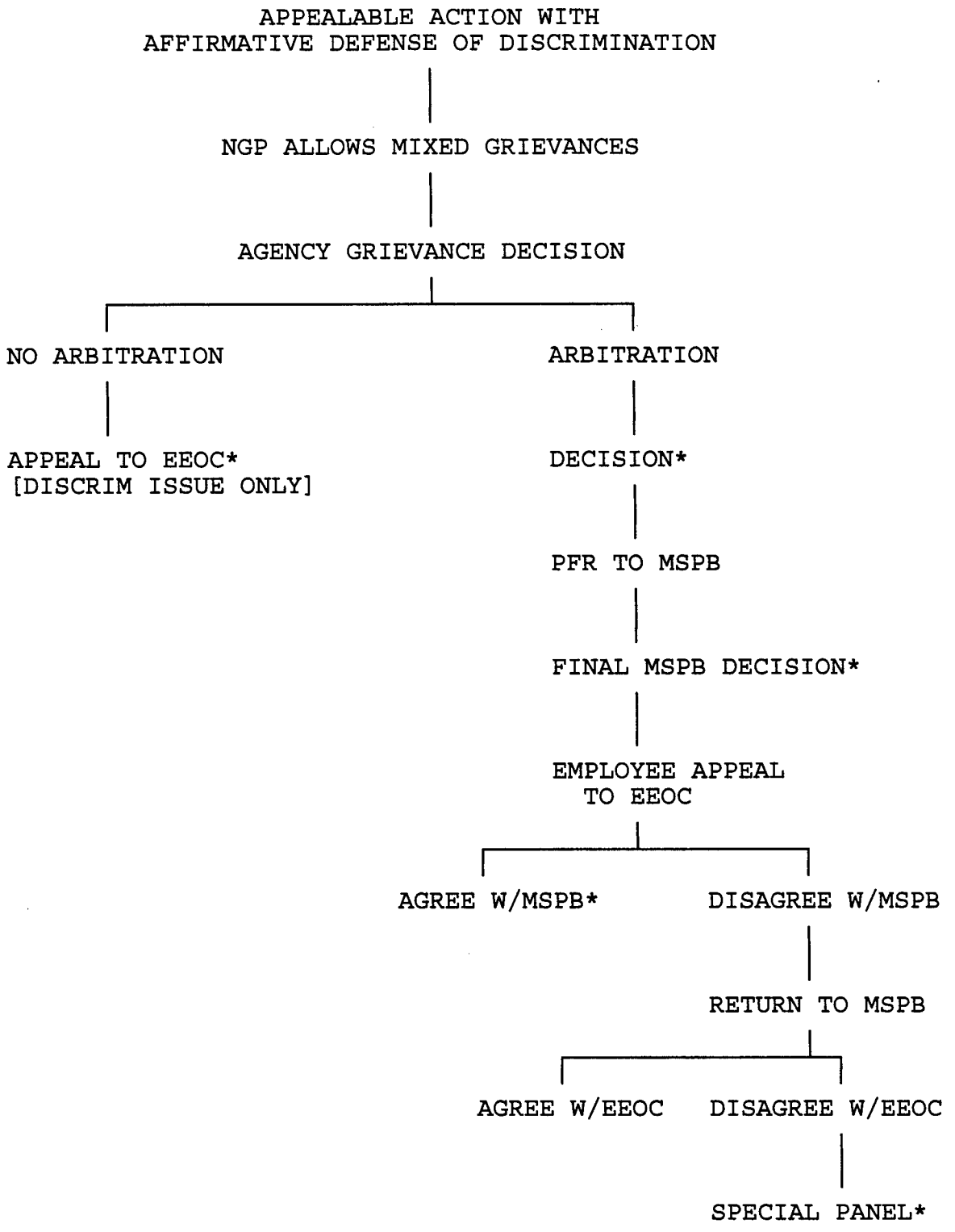


* = complainant may pursue civil action *de novo*

CHAPTER 43/75 GRIEVANCES [CURRENT]

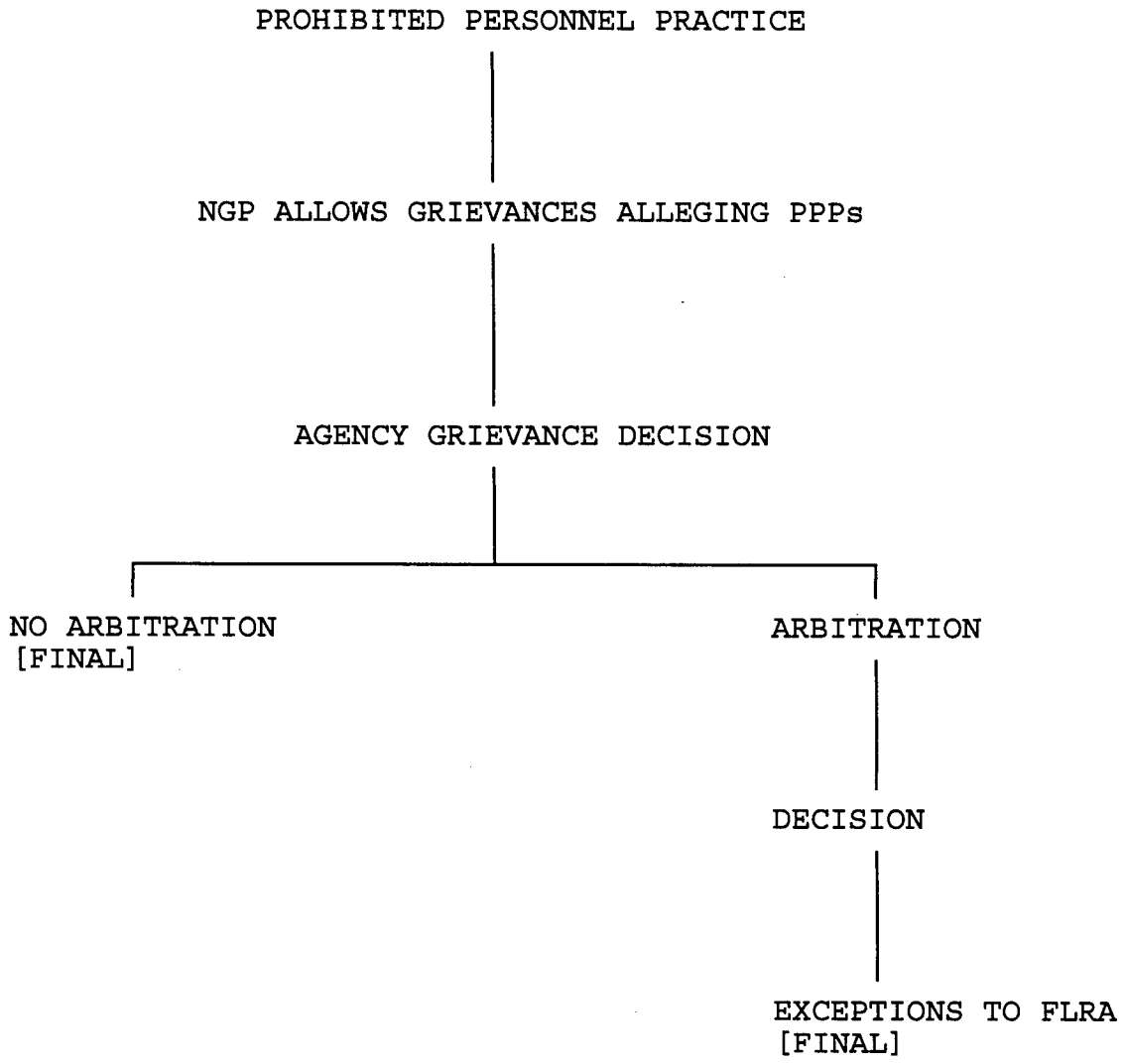


MIXED GRIEVANCES [CURRENT]

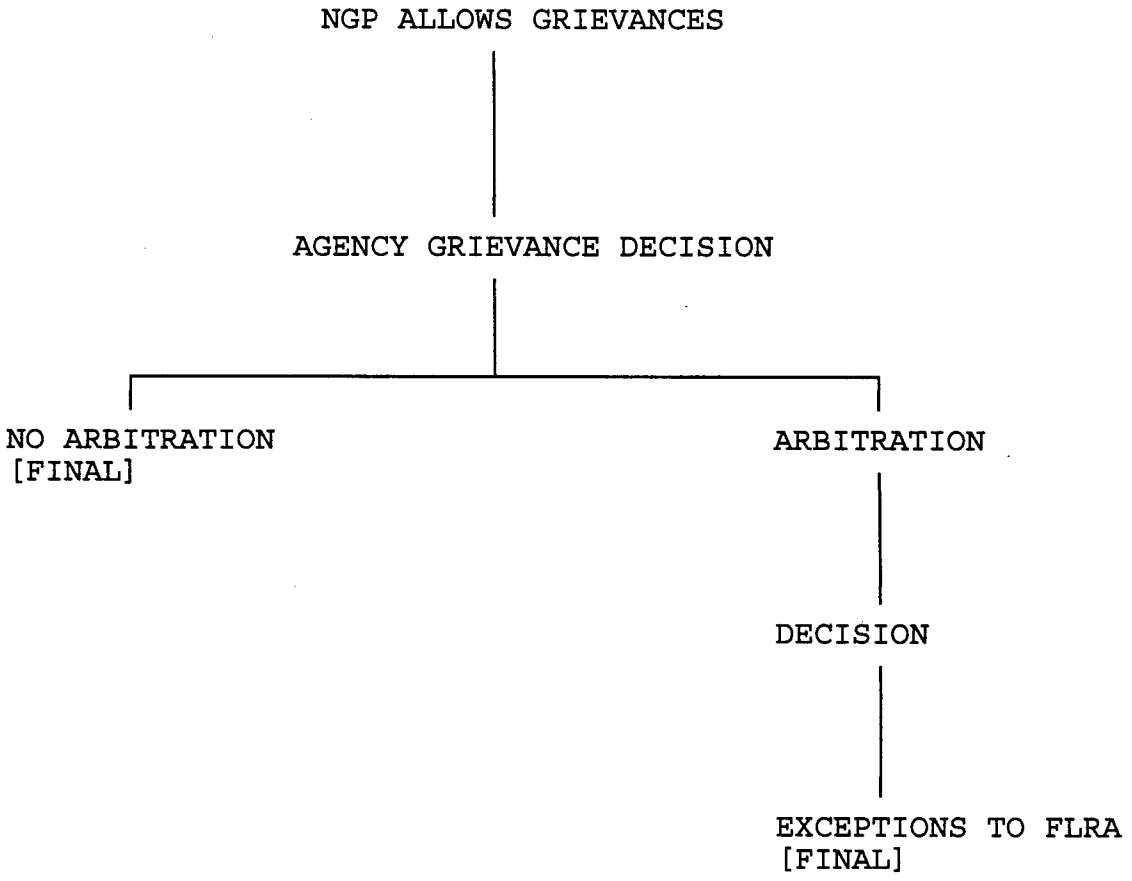


* = grievant may pursue civil action *de novo* on discrimination issue

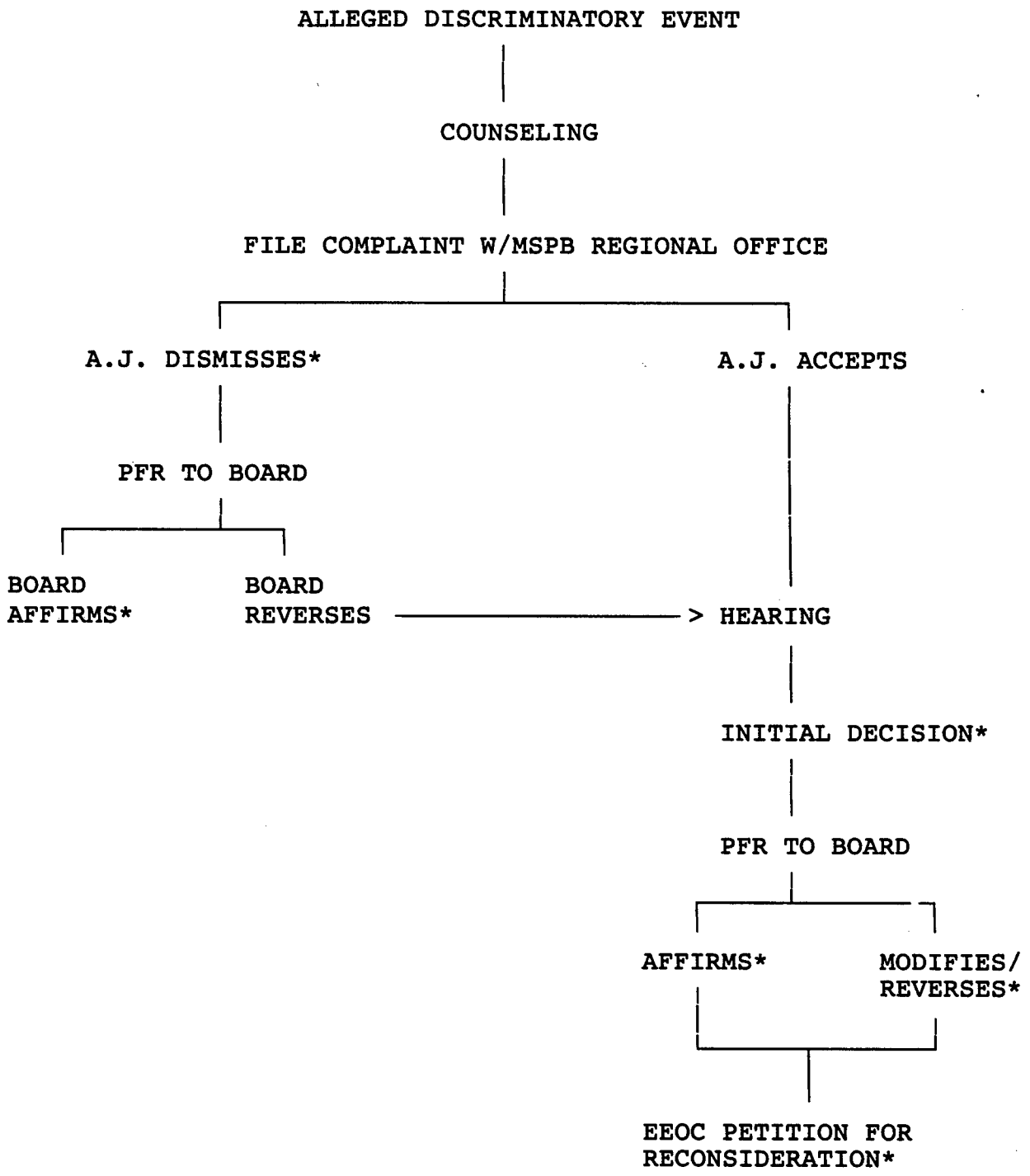
GRIEVANCES ALLEGING PPPs
OTHER THAN DISCRIMINATION [CURRENT]



GRIEVANCES INVOLVING OTHER PERSONNEL ACTIONS OTHERWISE W/IN MSPB APPELLATE JURISDICTION [CURRENT]

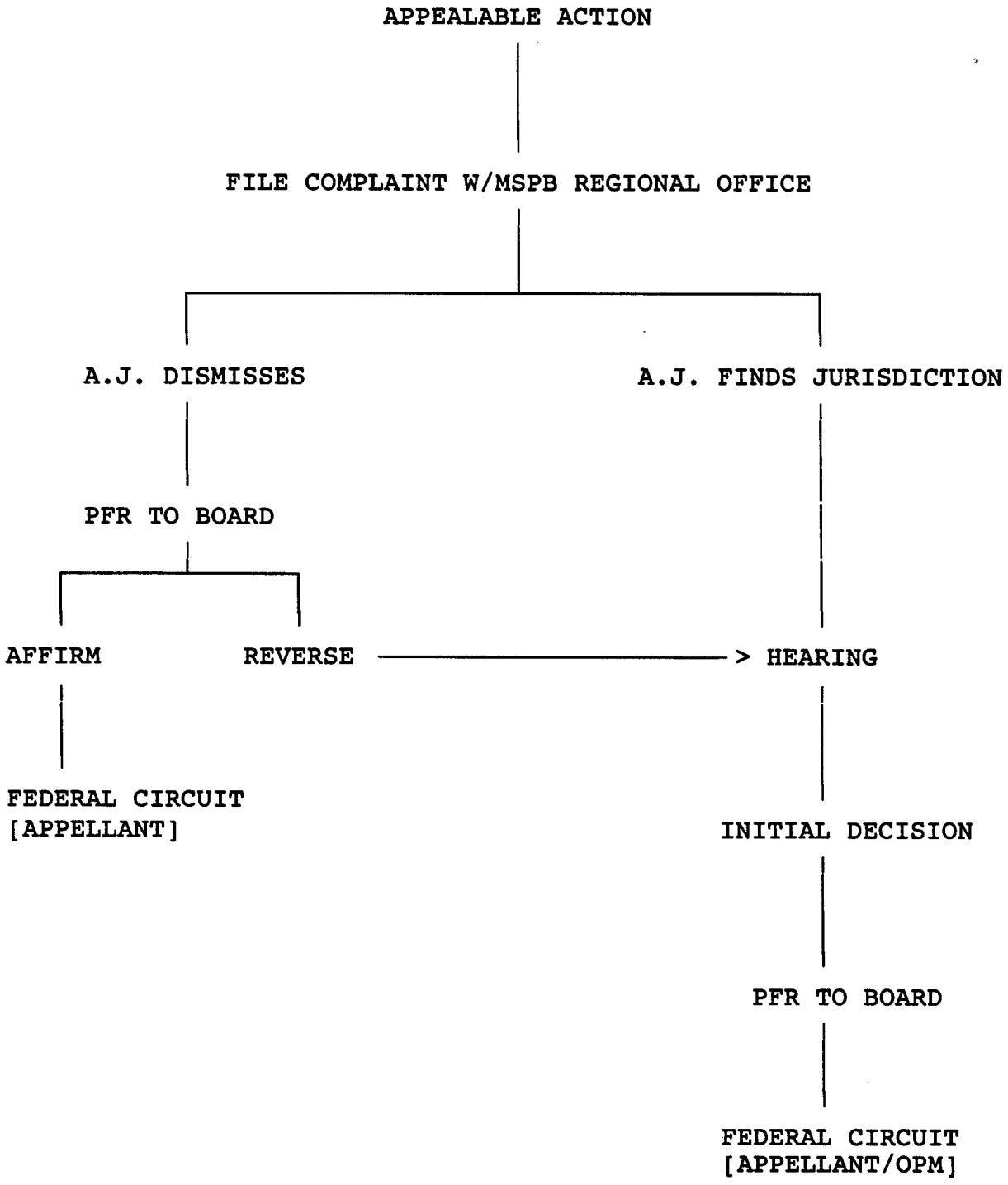


PURE DISCRIMINATION CASES [REVISED]

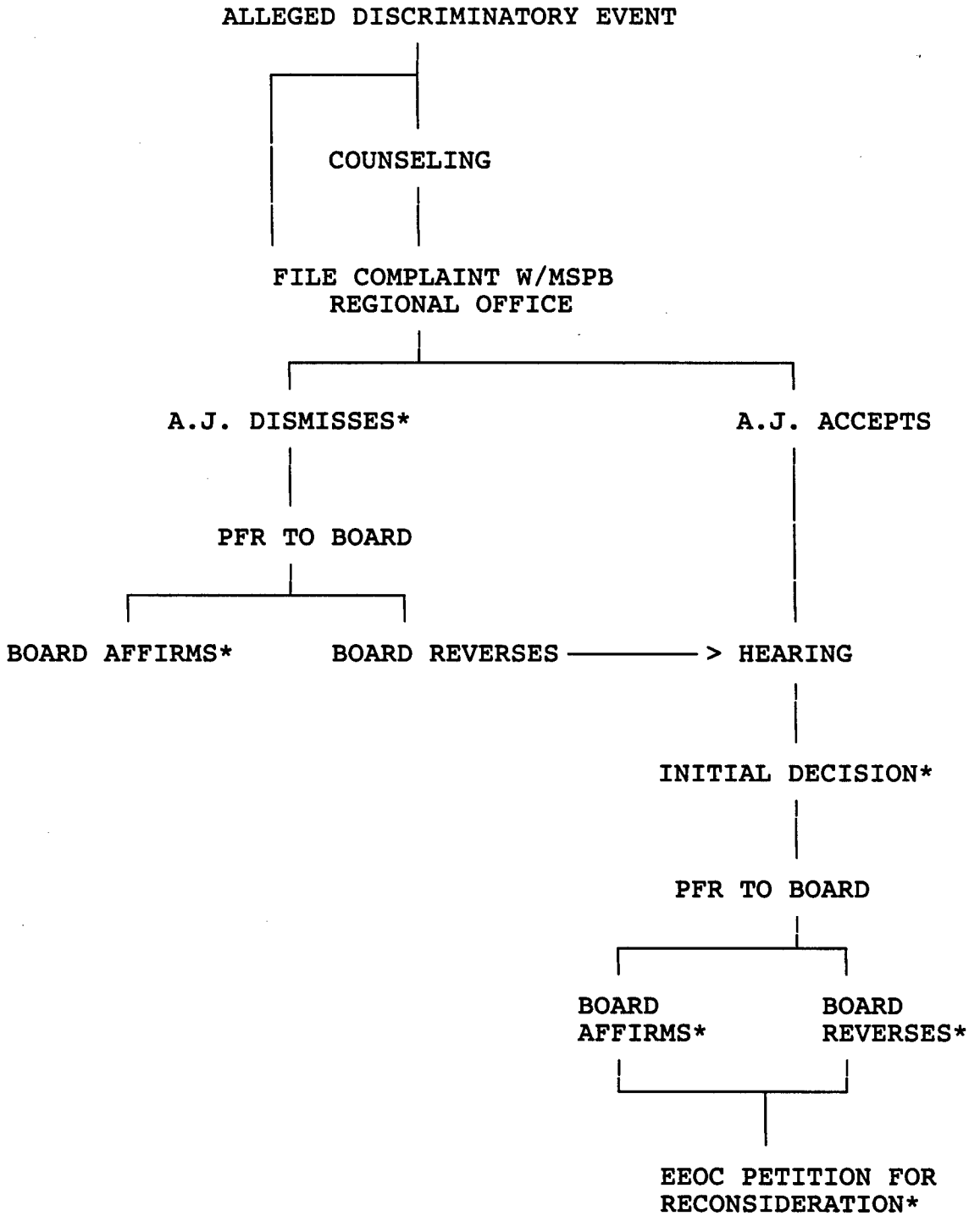


* = Complainant may pursue civil trial *de novo* on discrim. issue

PURE MSPB APPEAL [CURRENT & REVISED]

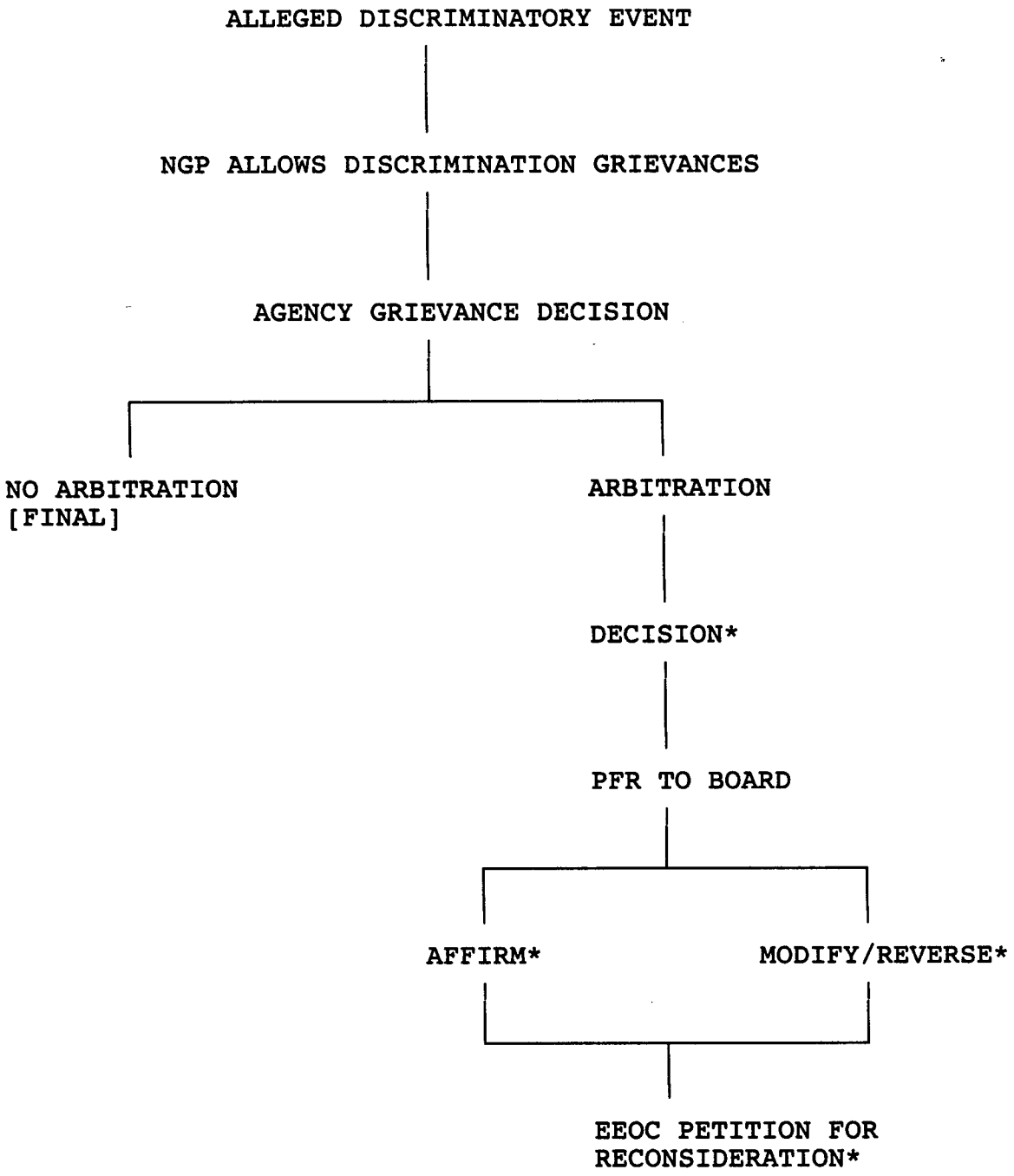


MIXED CASES [REVISED]



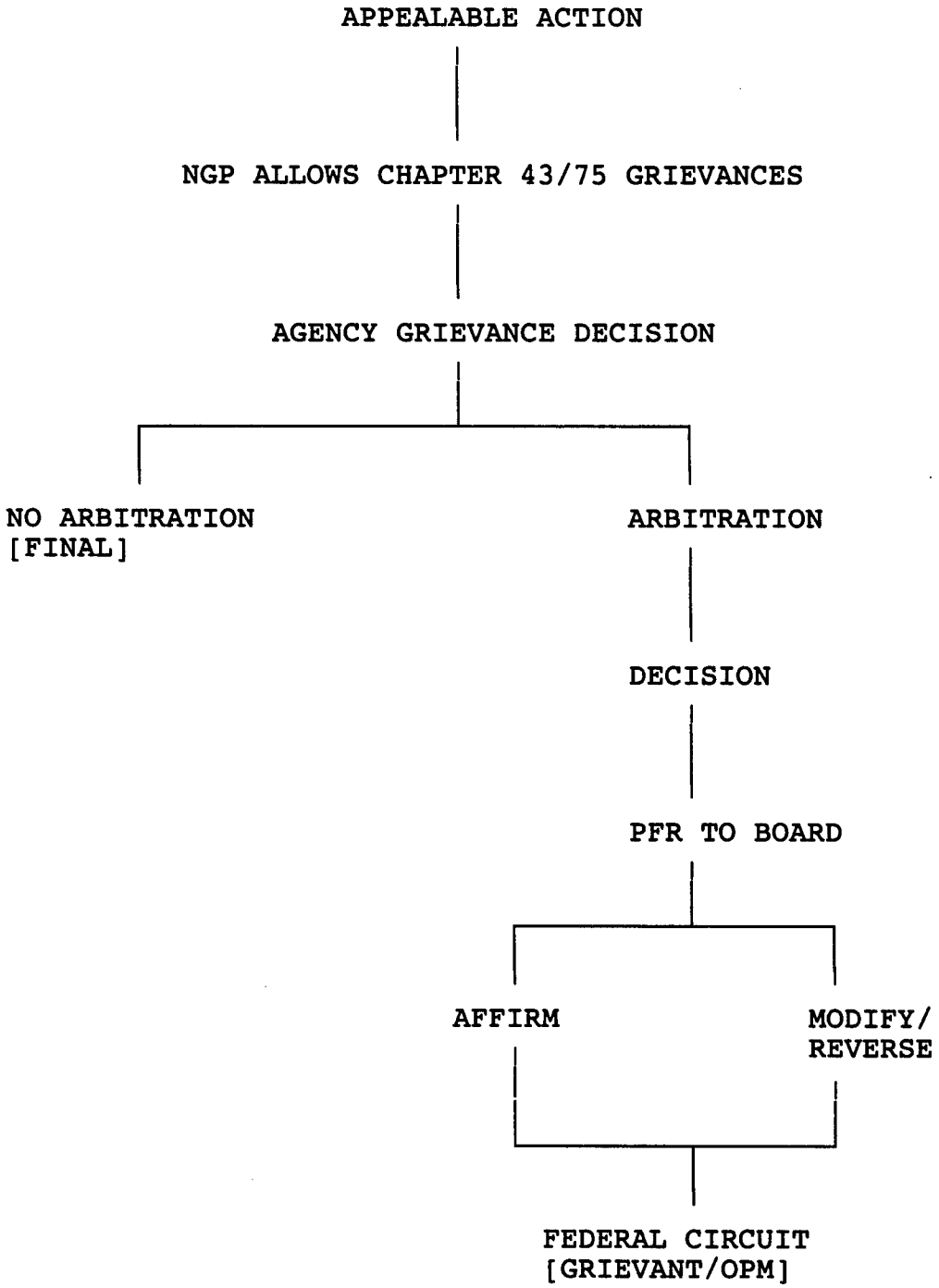
* = appellant may pursue civil trial *de novo* on discrim. issue and judicial review of MSPB final decision on civil service issue

DISCRIMINATION GRIEVANCES [REVISED]

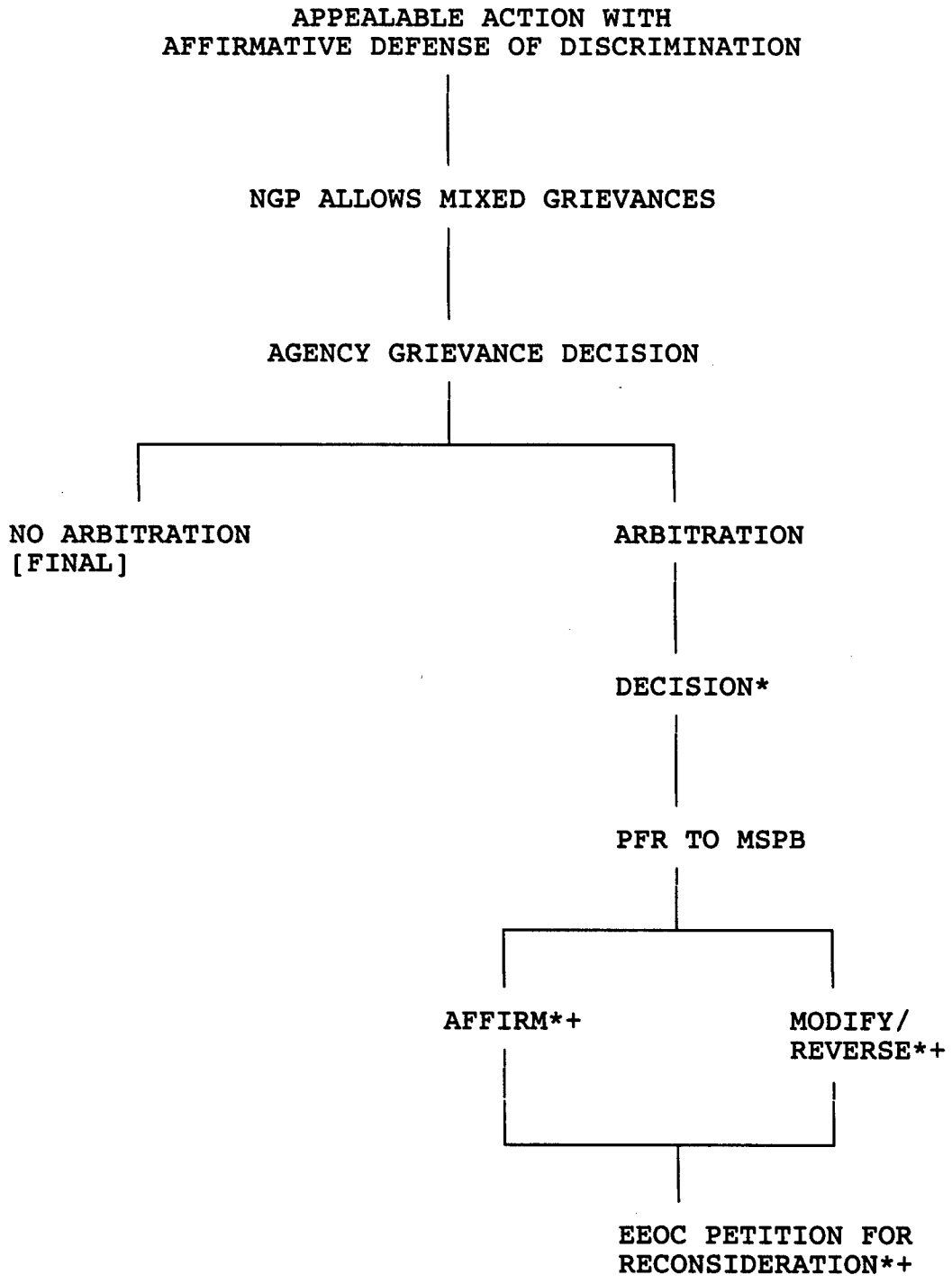


* = Grievant may pursue civil trial *de novo*

CHAPTER 43/75 GRIEVANCES [REVISED]

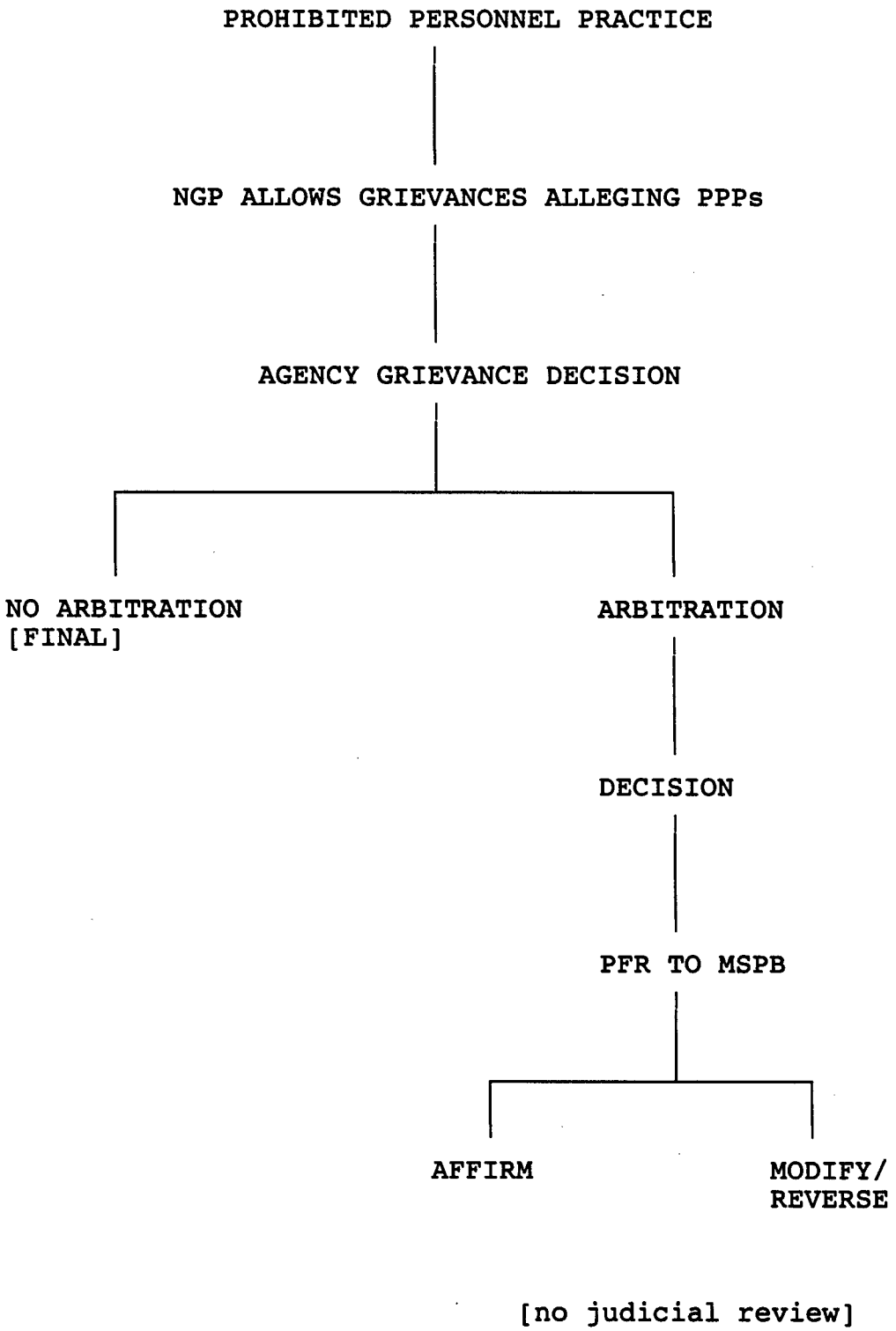


MIXED GRIEVANCES [REVISED]



* = Grievant may pursue civil trial *de novo* on discrim. issue
+ = Grievant may obtain judicial review of MSPB final decision on civil service issue

GRIEVANCES ALLEGING PPPs
OTHER THAN DISCRIMINATION [REVISED]



GRIEVANCES INVOLVING OTHER PERSONNEL ACTIONS
OTHERWISE W/IN MSPB APPELLATE JURISDICTION [REVISED]

